IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 30028

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
v.
KEATON VAN DER WEIDE
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA

THE HONORABLE RACHEL RASMUSSEN
Circuit Court Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Keaton Van Der Weide ("Van Der Weide") requests a review of the circuit court's rulings regarding S.D.C.L. § 19-19-412 and evidentary rulings regarding admission of incomplete text messages. Van Der Weide respectfully submits that this Court has jurisdiction pursuant to S.D.C.L. § 15-26A-3(1)[1].

STATEMENT OF LEGAL ISSUES

I. THE CIRCUIT COURT ERRED IN ITS APPLICATION OF THE RAPE SHIELD LAW WHICH PROHIBITED VAN DER WEIDE FROM DEFENDING HIMSELF WHICH ULTIMATELY LED TO UNREASONABLE EVIDENTIARY RULINGS.

S.D.C.L. § 19-19-412.
State v. Pugh, 2002 S.D. 16, 640 N.W.2d 79.
State v. Lykken, 484 N.W.2d 860 (S.D. 1992).

The circuit court erred in its application of the Rape Shield Law and thereby prevented Van Der Weide from defending himself against the allegation and led to arbitrary and unreasonable evidentiary rulings at trial.

STATEMENT OF THE CASE

On September 1, 2021, a Lincoln County Grand Jury returned an indictment alleging Keaton Van Der Weide ("Van Der Weide") committed Rape in the Second Degree on or about June 13, 2021. CR 1. The circuit court issued a Warrant for Arrest on September 3, 2021, and Van Der Weide was quickly apprehended. CR 5. Van Der Weide made his initial appearance

[1] For purposes of this brief, references are as follows: (1) "CR" designates the certified record; (2) "App." designates Appellant's Appendix.

on the Indictment on September 13, 2021 and a scheduling order was entered by the circuit court. CR 6.

Prior to trial, numerous pre-trial motions were filed, and three separate motion hearings were held. The first hearing was held on January 7, 2022, and several motions were addressed. CR 324. The circuit court also set deadlines for the parties, and a later hearing was set to address motions pertaining to S.D.C.L. § 19-19-412 and 404(a) evidence. CR 333. Subsequent to this hearing, the circuit court signed an Order on Pretrial Motions and filed the same on January 21, 2022. CR 48.

On February 3, 2022, the parties reconvened for the contested hearing on Defendant's Amended Motion to Disclose Evidence Pursuant to S.D.C.L. § 19-19-412(b)(1)(B). CR 62. At this hearing, the circuit court made various oral rulings, but no written Order was filed.

A Motion to Admit Photos of Sex Toys into Evidence at Jury Trial was filed on February 11, 2022 by Van Der Weide. CR 116. A hearing on this motion was held on February 17, 2022. CR 374. Again, the circuit court made oral rulings, but no written Order was filed.

Van Der Weide's jury trial began on February 23, 2022 in Canton, Lincoln County, South Dakota. CR 395. After the State's case-in-chief, Van Der Weide moved for a judgment of acquittal, and the circuit court denied this motion. CR 628. Trial lasted three days, and on February 25, 2022, Van Der Weide was found guilty of Rape in the Second Degree. CR 776. On May 13,

2022, Van Der Weide was sentenced to 20 years in the South Dakota State Penitentiary with 10 of those years suspended. CR 816-17. This appeal was timely filed on June 21, 2022. CR 297.

STATEMENT OF THE FACTS

On June 13, 2021, the Lincoln County Sheriff's Department and Beresford Police Department were dispatched to Exit 50 of Interstate 29 for a report of possible sexual assault. CR 566. Upon arrival, law enforcement came into contact with S.O., S.O.'s friend, and S.O.'s parents who were waiting by the side of the road. CR 567. S.O. reported Van Der Weide had just raped her. CR 579. Law enforcement testified at trial that they gathered very basic information so they could quickly send S.O. off to receive a medical examination. CR 578. However, the police reports show S.O. made detailed allegations at this initial roadside disclosure. CR 252.

S.O. reported she was living at an apartment in Beresford with Van Der Weide and their daughter, but the relationship was "basically over" and she had already packed her things to move out. Id. S.O. stated she went out the night before with some girlfriends and returned to the apartment around 9:30 a.m. on June 13, 2023. Id. Van Der Weide was at their home when she arrived, and S.O. stated he wanted to talk about their relationship. Id. She said they were sitting on the couch talking and Van Der Weide wanted to kiss her, but she told him no and pushed him away. Id. S.O. then stated "the next thing you know, I'm pinned to the fucking ground, telling him 'no',

screaming 'no.'" Id. She told officers Van Der Weide "tore [her] shorts off" in the living room and she struggled to get away into a bedroom. Id. She stated Van Der Weide followed her into the bedroom and threw her down and pinned her to the floor. Id. She said she bit his forearm and slapped his face, and thought there should be visible marks on him. Id. The officer asked S.O. to be more specific. She stated he had penetrated her vagina with his penis. Id. She was then sent off for a medical examination. Id.

Officers next went to locate Van Der Weide. CR 580. Van Der Weide was stopped by law enforcement in the parking lot of his apartment complex and was asked to go to the police station for an interview. CR 580-81. Van Der Weide readily and fully complied. Id. During the interview, Van Der Weide told law enforcement he and S.O. went out separately the night before, and that he arrived home before she did. CR 583. S.O. arrived home the next morning, June 13, 2023, and they had a conversation on the couch. Id. Van Der Weide acknowledged that at that time S.O.'s belongings were packed, she intended to move out, and they were sleeping in separate bedrooms most of the time. Id. He said the conversation on the couch led to "make-up sex." Id. He told law enforcement S.O. never told him "no" or "stop." CR. 583. He stated they had sex in the living room on the couch and ended up on the floor. CR 253. Van Der Weide confirmed he had penetrated S.O.'s vagina with his penis and also with "her toys." CR 253. Van Der Weide disclosed it was common for the couple to use sex toys during

intercourse, and that two different toys were used that day by both of them. Id. He confirmed this all happened in the living room, and the only time either of them went into the bedroom was to grab the toys. Id. Van Der Weide stated both of them removed S.O.'s shorts together, and that the shorts had not been torn, but merely jointly removed. Id. Officers then asked Van Der Weide to show his arms, and no bite marks, scratches, or any other signs of injury were observed. Id. After the encounter, Van Der Weide stated he went to take a shower, and when he got out, S.O. was gone. CR 254. During the interview with officers, Van Der Weide suggested S.O. was only making these accusations to gain the upper hand in a custody dispute. CR 254.

Law enforcement also interviewed Addalyn Hawkins ("Hawkins"), S.O.'s friend, and the person who called 911 to dispatch police. Hawkins was out with S.O. the night before, and called S.O. the next morning to make sure she made it home. CR 555. She testified she called S.O. sometime between 10-11 a.m. on June 13th and S.O. seemed fine. Id. S.O. told her she was "just sitting on the couch" and seemed ok. CR 556. Approximately ten minutes later, Hawkins received a call from S.O. Now S.O. was crying and claimed Van Der Weide raped her. Id. Hawkins met S.O. just off the interstate and called 911 to report the incident. CR 559.

The day after the alleged rape, law enforcement sat down with S.O. for a formal interview. CR 256. The events relayed by S.O. on this day were

essentially the same as the day before save a few key differences. First, now S.O. claimed Van Der Weide began the assault around 9:30 a.m. that Sunday morning after the couple spoke for about thirty minutes. CR 256. She stated her 10:33 a.m. call to Hawkins occurred just minutes after the alleged rape. CR 256-57. Second, she also now claimed during this interview that Van Der Weide had penetrated her both vaginally and anally with his finger. CR 256. Prior to this, her only statement to law enforcement had been vaginal penial penetration[2]. CR 252. She confirmed she had no visible physical injuries such as brises, bite marks, or scratches, despite describing an otherwise very physical encounter. Id. S.O. repeated over and over that Van Der Weide had not used a sex toy during the encounter. When pushed multiple times by law enforcement, she finally admitted a toy was involved but claimed Van Der Weide "grabbed a toy from the drawer but she grabbed it away from him and threw it at his face." CR 258.

Van Der Weide was not arrested until several months later in September of 2021. In preparation for trial, Van Der Weide filed an Amended Motion to Disclosed Evidence Pursuant to SDCL § 19-1-412(b)(1)(B). CR 62. Hearing on this motion was held on February 3, 2022. CR 338. Of particular note, Van Der Weide motioned the circuit court for permission to enter evidence that sex toys were used during the alleged

[2] Additionally, Alyssa Rusch, the nurse who was present with S.O. at the hospital and who collected information about the alleged rape, indicated S.O. said there was no anal penetration. CR. 716.

encounter, that it was common for the couple to use these toys, and that S.O. directed him how and when to use the toys on this day. CR 346-347. Van Der Weide requested this evidence to come in as it is directly related to his defense of consent by S.O. in that she authorized the usage of two different toys during this encounter. CR 347. He also sought to introduce it because their history together of using the toys was similar to this exact encounter, making it relevant and outweighed by undue prejudice[3]. CR 352. Additionally, when Van Der Weide gave his interview, he immediately disclosed the usage of toys that day, and law enforcement went back to the house and took several sex toys into evidence[4]. CR 347. Van Der Weide sought to introduce this evidence in order to show S.O. consented to the use of the toys and intercourse, as had been their typical course of conduct.

The state objected, claiming the sex toys to be irrelevant because S.O. never said any sex toys were used that day. CR 347. However, after a brief recess, and reviewing the police reports, the state changed its rendition of the

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[3] At the 412 Hearing, the evidence of the sex toys was sought to show consent as a defense and relating to the credibility of Van Der Weide. Later, as discussed below, this evidence became relevant related to S.O.'s credibility during trial.

[4] The sex toys alleged to be used during this encounter were found by law enforcement in the apartment, in the bedroom identified as S.O.'s room, in the top drawer of a set of drawers inside a closet. Some were also found in a cabinet in Van Der Weide's bedroom. CR 255. No other sex toys were found on open surfaces or otherwise discarded around the apartment, contradicting S.O.'s statement that she threw one at Van Der Weide.

facts and stated, "So my understanding in speaking with the victim is that one of the sex toys he did grab for, so the State would have no objection to reference to that sex toy, but would object to any other sex toys being referenced or that her preference was to always use sex toys.[5]" CR 350. The state then represented it intended to put forth in its case "[t]hat he attempted to use one of the toys to penetrate her, and nothing –one toy to penetrate her." CR 351.

The circuit court ruled as follows:

> The allegations that will be presented to the jury if the defendant committed the sexual assault in this case would include any specific allegation that include the action of the defendant on that night that he's supposedly committed – or during the instance. The use of that sex toy or device during the scope of the rape allegations as it will be presented against the defendant does then become relevant. I think it would be prejudicial to credibility as well as to the actual instance, and, beyond that, that does not mean that the victim's prior sexual history, preferences, or anything of that sort are relevant. I think whether or not the use of such devices was normal in their relationship is as far as any of that information can go . . . But what

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[5] Later in the hearing, the state again confirmed after talking with S.O. that morning, S.O. said Van Der Weide attempted to use the sex toy in concert *with penial penetration*, an act that Van Der Weide said was normal conduct for them and went to his defense of consent. CR 355. However, S.O. had given two prior interviews with law enforcement and never disclosed any attempt by Van Der Weide to use any object in connection *with penial penetration*. As stated above, she repeatedly confirmed in her second interview that no other objects were used. CR. 257-58. Eventually she stated Van Der Weide grabbed one, but she took it away from him and threw it in his face. Id. However, the morning of the hearing, the allegation was he was attempting to use the toy *with penial penetration*, which contradicts prior statements, and is contrary to the location of the sex toys in the apartment.

> is, quote, normal is relevant to the issue of consent between the parties[6].

CR 352-53. The circuit court went on to explain it had only ruled one sex toy would be relevant, despite Van Der Weide's consistent statement that two were used that day, and that it was not going to make a decision on whether Van Der Weide could introduce that evidence if the state did not introduce it. CR 353. The state then again changed course and stated it would not bring up any mention of the sex toys in its case-in-chief. Id. When Van Der Weide then sought more clarification from the circuit court, the court indicated no further clarification would be given. Id.

Additionally, the parties discussed text messages that were sought to be introduced at trial in which the parties discuss their sexual relationship days before the alleged rape. CR 366. Van Der Weide sought to introduce these messages into the record to illustrate the "consensual nature of the intimacy between them...." CR 366. The state did not object and characterized some of Van Der Weide's statements in the texts as "requests that the victim pay rent or provide him with sex.[7]" Id. The circuit court

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[6] In this ruling, the circuit court explicitly agrees with Van Der Weide's initial argument that this evidence is relevant to the issue of consent between the parties, but then contracts this statement in ultimately ruling Van Der Weide cannot enter this evidence unless the state does so first. See below.

[7] Later the State would refer to these as "sex for rent" statements (CR 671) despite Van Der Weide repeatedly stating that was an incorrect characterization as those texts were taken out of context.

admonished Van Der Weide's counsel of her duty to advise her client that such messages could lead to further criminal charges. CR 368. After defense counsel conversed off the record with Van Der Weide, Van Der Weide did not enter the text messages into the record.[8] CR 369.

Van Der Weide then filed a Motion to Admit Sex Toys at Trial, and hearing on that Motion was held on February 17, 2022. CR 378. At the hearing, Van Der Weide made an offer of proof by way of two pictures of the sex toys obtained by law enforcement that Van Der Weide stated were used the day of the alleged rape and made a request for introduction of the same at trial. CR 378. The state once again changed course and advised it now again planned to ask one question regarding the sex toy and Van Der Weide's alleged attempt to use the toy and the rejection by S.O. CR 387.

The circuit court ruled Van Der Weide could not bring in any evidence of the sex toys unless the state introduced such evidence in its case first. Only then could Van Der Weide bring up that issue in his defense, but no pictures or objects could be entered into evidence. CR 392.

At trial, S.O. testified about the alleged rape but was never asked questions on direct about Van Der Weide grabbing for a sex toy. On cross-examination, S.O. was asked if she grabbed anything during the altercation.

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[8] The messages were never entered into evidence, so there is no record of what they actually contained, the context of the conversation, which Van Der Weide clearly wanted to discuss, or whether there was any potential criminal liability for Van Der Weide based on statements. Later cross examination indicates there was very likely no actual criminal liability in these messages.

She said no. CR 551. She was asked again if she told police she "grabbed for something in the bedroom" and she said no. CR 551. These statements directly contradicted prior statements to law enforcement.

Subsequent to S.O.'s testimony, Officer John Krebs ("Officer Krebs") testified. CR 574. On cross examination, Van Der Weide attempted to illicit testimony from Officer Kreb's regarding statements S.O. made about grabbing an "object" or throwing anything at Van Der Weide. CR 595. The state immediately requested a side bar, and a discussion was held off the record. Id. After the side bar, Van Der Weide requested to make a record outside the presence of the jury, but the circuit court would not permit the record until after the cross-examination was complete. Id.

Once the jury was excused, Van Der Weide made the record that the circuit court would not allow impeachment of S.O., even to the point of prohibiting the use of the term "object" instead of specifically referring to a "sex toy." CR 600-601. A rather long dialogue ensued as follows:

> **The Court**: During the bench conference you had indicated to the Court that you believe you could ask about the sex objects.
>
> **Defense**: I mention of the – well, I was asking him about the grabbing or throwing anything is where I was trying to get. I know it's going to come out as sex object.
>
> **The Court**: Then you can't elicit anything you know the Court has already ruled on.
>
> **Defense**: I'm not – I'm just trying to get out that she said she didn't grab anything and he would be

able to say she did which is directly inconsistent with her testimony.

The Court: But you also want to introduce that this object was a sex item; correct?

Defense: If there's a way to elicit it without that being introduced, I'm fine. My main thing here is she said she never grabbed or threw anything and he's going to be able to say she did claim she did previously.

The Court: I apologize. I don't believe I'm getting a consistent read. When you were up at the bench and you were asking to go down the line of questioning – at that point in time, you indicated that you believed you could bring up the sex objects and sex toys. I advised that pursuant to my prior ruling based upon what the State needed to put forth before that would become relevant that that had not been done, so that wasn't relevant. So at that point when you were at the bench and we were in the middle of taking his cross-examination testimony, you wanted to introduce the sex toy – or sex object. So that was why my ruling was as that point in time what it was. I can't go back and undo that because now you want to do that. Because now you want to – just want to introduce it just for the credibility and don't want to mention sex toy, even though you said again, you think it would come up in his response.

Defense: When I responded at the bench, Your Honor, I said that it was a credibility issue for the reason that I wanted to bring it up based on the inconsistent statement.

The Court: I understand that but not every inconsistent statement can come in based on that balancing of probative and prejudicial, especially with the 412 hearings that we've had and the rulings I've made. I can understand why the defense thinks – again, bringing that up would be relevant, may go to credibility, but I previously

> ruled more than once now that *if that is not brought up in the State's case in chief and it's not an element that needs to be met, a reasonable doubt can go to the jury to find the defendant guilty – it's not a material element* – then any probative value is highly outweighed by the prejudicial effect and I believe those items would fall under the rape shield law.

CR 602-03; App 004-007 (emphasis added). The circuit court then went on to discuss whether or not this was proper impeachment. Id. Ultimately, the circuit court ruled this was not proper impeachment and was not relevant. CR 608. The circuit court went on to say that if it is relevant, it's still not allowed because it's:

> ...more prejudicial, again, for reasons I've begin (sic) on a couple of different occasions about why the jury does not need to view or learn about what sex objects may or not have been used *as the State's not offering those objects as part of the crime that they need to prove.*

CR 609 (emphasis added). Officer Krebs was then released from subpoena and S.O.'s inconsistent statements were never confronted.

Van Der Weide also testified at trial. CR 635. Van Der Weide testified about a long but rocky relationship, but that he felt the ultimate goal was to continue working on the relationship. CR 637. During direct testimony, several exhibits of text messages between Van Der Weide and S.O. were entered as exhibits. CR 640. These were messages from several months before the alleged rape and the day of and day after. CR 641-42. The conversations discussed their daughter and day to day happenings. CR 643.

Van Der Weide testified they were still living together, still working on their relationship, and still intimate together. CR 644. He stated they had a pattern of breaking up for a few days, getting back together, being intimate, and then breaking up again after a week or so. CR 645. He indicated that is exactly what happened on June 13, 2023. CR 647.

Van Der Weide testified they were sitting on the couch discussing their relationship, and it led to consensual sex. CR 648. Shortly after they started being intimate, S.O.'s phone rang and she said she needed to answer it.[9] CR. He then said "I told her – or – I told her that's fine. And then she told me to go to the bedroom and grab an undisclosed object." CR. 648. The State immediately objected, and the objection was sustained. CR 648. Van Der Weide was then asked "then you went into the bedroom?" to which he stated "We went into the bedroom shortly after. It wasn't too much longer. I'd say four or five minutes. . .. Mainly just to grab --." CR 649. The state objected again, the circuit court sustained the objection, and Van Der Weide was admonished before the jury. Id. Van Der Weide went on to deny the rape, deny any screaming, running away, crawling, slapping, biting, kicking, and maintained this was an entirely consensual encounter. CR 649-50.

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[9] Van Der Weide's testimony that S.O. received this call lines up with that of Hawkins who stated she called S.O. and everything was fine and then S.O. called her back about 10 minutes later alleged she had just been raped. Incidentally, S.O.'s timeline of events does not correlate with that of Hawkins as she stated the assault started about 9:30 a.m., and that she did not call Hawkins until 10:30 a.m. However, Hawkins testified she talked to S.O. about ten minutes prior to the 10:30 a.m. call in which S.O. seemed fine.

Prior to the state's cross-examination of Van Der Weide, the state moved for a mistrial due to Van Der Weide's statement that he went to get an "undisclosed object." CR 655. After hearing arguments from both sides and taking a short recess, the circuit court gave a long soliloquy that a curative instruction would not work in this case, and appeared ready to declare a mistrial. CR 664. The state then unexpectedly withdrew its own motion for a mistrial, after veraciously arguing there was no other way to proceed, and only after consulting S.O. CR 666.

After the state withdrew its motion for mistrial, it sought to enter text messages between the parties with which to cross examine Van Der Weide. CR 668. Primarily, the state sought to examine Van Der Weide on messages between the two of them which discussed their sex life, custody of their child, and other reasons they were separating. CR 671. The text message packet the state sought to introduce was approximately 44 pages. CR 669. The state notified the circuit court that the messages contained the text it previously characterized as "sex for rent" and emojis that were sexual in nature. Id. The state then went through the messages, cherry-picking portions of the messages about which it intended on questioning Van Der Weide. 672-73.

Van Der Weide objected, arguing the redactions were misleading because statements were taken out of context of the conversation. CR 668. He argued, "[b]ut the way this is presented is just leaving out things that put

[S.O.] in a specific light and don't (sic) leave the full conversation." CR 674. Additionally, Van Der Weide stated this packet of texts left out messages where S.O. made statements that if Van Der Weide bought her things, they could have "loads of sex," and that this back and forth about money and sex was normal for S.O. CR 675.

The circuit court ruled that Van Der Weide could not present evidence of S.O. saying she would have sex with Van Der Weide if he bought her things to counter the state's argument that Van Der Weide offered sex for rent. CR 675. Additionally, the circuit court ruled the state was allowed "some leeway on cross-examination as far as other reasons why they have not been getting along." CR 676. Van Der Weide clarified as to whether he was permitted to say one of the reasons they weren't getting along was S.O. being unfaithful to him. Id. The circuit court ruled Van Der Weide could not say anything about S.O. cheating on him. Id.

After this back and forth, the state indicated it would not offer the packet of text messages as an exhibit, but would only cross examine Van Der Weide on the information. CR 678. Over several objections from defense counsel, and Van Der Weide repeatedly stating the messages were taken out of the proper context and were extremely misleading, the state was permitted to cross examine Van Der Weide about the selected text messages, which were never put into full context and never entered into the record. (See App. 008-015).

On re-direct, Van Der Weide attempted to explain that the "snippets of conversation" the state had cross on were not the full conversation[10]. CR 698. Van Der Weide felt part of working on their relationship was to have more sex, and that it was common for both of them to use emojis back and forth. CR 699.

Additionally, S.O.'s medical records were never submitted to the jury based on the following dialogue between the attorneys:

> **State**: Ms. Griese, do you intend on putting or attempting to put in the victim's medical records?
>
> **Defense**: Are you objecting?
>
> **State**: Yes.
>
> **Defense**: Then no.

CR 623. No medical testimony was presented at trial from either side indicating whether S.O.'s rape examination showed any signs of force, or whether she had any injuries at all[11].

Ultimately, Van Der Weide was convicted of Rape in the Second Degree, and was sentenced to 20 years in the South Dakota State Penitentiary with 10 years suspended.

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[10] However, the circuit court's rulings prevented Van Der Weide from making several statements that would have put those "snippets" into the proper context.

[11] It is unclear from the record why the Defense did not seek to have S.O.'s medical records entered simply because the state objected, and therefore not a subject that can be addressed on direct appeal.

STANDARD OF REVIEW

"Statutory interpretation and application are questions of law, and are reviewed by this Court under the de novo standard of review." *Rotenberg v. Burghduff*, 2007 S.D. 7, ¶ 8, 727 N.W.2d 291, 294 (quoting *State v. $1,010.00 in Am. Currency*, 2006 S.D. 84, ¶ 8, 722 N.W.2d 92, 94). Additionally, appellate review on constitutional questions is reviewed de novo. *State v. Ball*, 2004 S.D. 9, ¶ 18, 675 N.W.2d 192, 198.

On issues regarding evidentiary rulings, this Court reviews a lower court's rulings for an abuse of discretion. *State v. Abdo*, 2018 S.D. 34, ¶ 14, 911 N.W.2d 738,742. A circuit court abuses its discretion when that discretion is "exercised to an end or purpose not justified by, and clearly against, reason and evidence." *State v. Engelmann*, 541 N.W.2d 96, 100 (S.D.1995).

ARGUMENT

A full examination of the trial record below in this case demonstrates a manifest injustice occurred mandating a new trial. The record is chaotic and confusing. To narrow down core issues on appeal is difficult when the record is abounding in equivocations, reversals, and contradictions. In circumstances such as these, the summation is best left to the immortal words of Mark Twain's introduction to Adventures of Huckleberry Finn: "Persons attempting to find a motive in this narrative will be prosecuted; persons attempting to find a moral in it will be banished; persons attempting to find a plot in it will be shot."

I. THE CIRCUIT COURT ERRED IN ITS APPLICATION OF THE RAPE SHIELD LAW WHICH PROHIBITED VAN DER WEIDE FROM DEFENDING HIMSELF WHICH ULTIMATELY LED TO UNREASONABLE EVIDENTIARY RULINGS.

The Federal Rape Shield Law (Rule 412) was adopted and enacted into law by South Dakota in 2012. 2011 South Dakota Laws Ch. 237 (SCR 10-13). This statute provides restrictions on evidence of a victim's sexual behavior or predisposition in sex cases as follows:

> (a) **Prohibited uses**. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
>
> 1. Evidence offered to prove that a victim engaged in other sexual behavior; or
> 2. Evidence offered to prove a victim's sexual predisposition.
>
> (b) **Exceptions**.
>
> 1. Criminal cases. The court may admit the following evidence in a criminal case:
>
> . . .
>
> B. Evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, *if offered by the defendant to prove consent* or if offered by the prosecutor; and
>
> C. Evidence *whose exclusion would violate the defendant's constitutional rights.*
>
> . . .

S.D.C.L. 19-19-412 (emphasis added). The purpose of the Rape Shield Law is to "protect victims from the humiliation of having their *unrelated* sexual conduct paraded before juries." *State v. Pugh*, 2002 S.D. 16, ¶ 13, 640 N.W.2d 79, 83 (emphasis added).

In this case, the circuit court applied the Rape Shield Law so broadly that instead of a shield intended to prevent embarrassment for S.O. having her "*unrelated* sexual conduct paraded before juries", it became a sword wielded against Van Der Weide, proactively blocking him from admitting *related* sexual conduct to prove consent. Under the circuit court's interpretation of Rule 412, Van Der Weide was barred from putting on his full defense, prevented entirely from confronting S.O.'s contradictory statements and attacking her credibility, as is his constitutional right, and forced to address text messages taken out of context. While the record in this case is confusing to say the least, it is apparent the circuit court hamstrung Van Der Weide from defending himself against these allegations.

a. Violation of S.D.C.L. § 19-19-412(b)(1)(B)

First, Van Der Wiede's entire defense was that S.O. consented to this encounter, no different than other times he had been with S.O. It was common for the couple to break-up and make-up, and it was common for them to use sex toys during intercourse. Van Der Weide repeatedly and consistently said this was consensual, specifically pointing to S.O. telling him to get the sex toys during this encounter. Van Der Weide's statements that S.O. told him to get the toys from the bedroom when she got a call was consistent with Hawkin's testimony that she called S.O. approximately 10 minutes before S.O. claimed she was raped, and everything was fine.

In order to defend himself with evidence this was a consensual encounter, Van Der Weide necessarily needed to give details about what happened during the alleged rape – details regarding his side of the story. Details involving the sex toys. Details about this being the normal course of conduct between them. Detailed of *related* sexual conduct showing consent. Details consistent with Hawkin's testimony. Details consistent with where law enforcement found the sex toys in the apartment. Evidence and testimony regarding the sex toys used during the alleged rape were admissible under S.D.C.L. § 19-19-412(b)(1)(B) to prove consent and the circuit court erred in prohibiting Van Der Weide from admitting this evidence.

The circuit court's own ruling regarding the sex toys was confusing. First, when the state indicated it sought to introduce evidence of one sex toy, the circuit court ruled it could come in. In fact, the circuit court specifically affirmed what is "normal is relevant to the issue of consent between the parties" and is admissible. CR 352-53. This was Van Der Weide's consistent argument and the circuit court explicitly agreed. However, the state waffled a few times on whether it would present this evidence in its case in chief, but ultimately decided not to illicit testimony regarding the sex toys from S.O. Subsequently the circuit court barred Van Der Weide from discussing the sex toys at all, despite previously stating on the record that they were relevant to the issue of consent.

The circuit court seemly applied the Rape Shield Law to only allow evidence of the sex toys if the prosecution presented it. Looking at 412(b)(1)(B), the statute clearly states evidence of the "victim's sexual behavior with respect to the person accused of the sexual misconduct" is allowed "if offered by the defendant to prove consent ***or*** if offered by the prosecution." Emphasis added. The record below shows the circuit court essentially substituted the word "*or*" for the word "*and*" by permitting evidence of the sex toys only if it proved consent ***and*** only if the state presented it.

Repeatedly, the circuit court made statements that if the prosecution did not need evidence of the sex toys to meet its burden, then the evidence would be prohibited. For example, the circuit court stated the jury did not get to hear anything about sex toys because "the State's not offering those objects as part of the crime that they need to prove." CR 609.

S.D.C.L. § 19-19-412 provides a defendant the opportunity to present evidence proving consent, but it does *not* require "*and*" in conjunction with the state's presentation. The circuit court failed to acknowledge evidence at trial is not limited to what the state needs to prove the elements of its case. Evidence at trial also includes that which helps the defendant defend himself, particularly here where the statute specifically states evidence proving consent is permissible.

Van Der Weide was not attempting to harass or embarrass S.O. with extraneous evidence, but to tell the jury what happened *during this encounter* to prove S.O. consented when she told him to go get the sex toys. He was not allowed to put on his full defense. Even when testifying, he attempted to relay the events as they happened, but was stopped and admonished in front of the jury for saying "undisclosed object." Van Der Weide's confusion and frustration was evident throughout the transcript because he did not know how to say what happened when the circuit court continued to bar him from mentioning a key event that proved consent.

In other South Dakota cases where defendants argued an alleged rape was consensual, the Rape Shield Law[12] was never used to prohibit the defendant from telling the jury what happened *during the alleged rape* and why a defendant believed it was consensual. See *State v. Malcolm*, 2023 S.D. 6, 985 N.W.2d 732 (affirming the exclusion of statements indicating consent made well before the act of sexual penetration, explicitly rejecting an advanced consent theory (logically following that consent with a defendant must be contemporaneous to the act of penetration); *State v. DeNoyer*, 541 N.W.2d 725 (S.D. 1995) (affirming the exclusion of the victim promising sexual acts with a third party as it was not relevant to the issue of consent with defendant); *State v. Woodfork*, 454 N.W.2d 332 (S.D. 1990) (affirming

[12] Prior to the Rape Shield Law's enactment, South Dakota previously prohibited admission of evidence concerning a rape victim's prior sexual conduct under S.D.C.L. § 23A-22-15 (repealed).

the exclusion of victim's prior sexual history with a third party as not "indicative of her inclination" to consent with defendant).

In fact, most of the South Dakota cases under the Rape Shield Law affirm the prohibition of evidence regarding the alleged victim's other sexual behavior with other people (*State v. Golliher-Weyer*, 2016 S.D. 10, 875 N.W.2d 28), or other sex crime accusations (*State v. Most*, 2012 S.D. 46, 815 N.W.2d 560).

South Dakota has also prohibited evidence of prior sexual encounters between parties that were *dissimilar* to the rape allegations. In *State v. Lykken*, Lykken sought to introduce explicit pictures and recordings detailing *prior* sexual interactions and statements between the two as relevant to the issue of consent. 484 N.W.2d 860, 873 (S.D. 1992). The trial court allowed general testimony about a prior consensual sexual relationship, but did not allow the photographs or tapes of prior encounters as the probative value of that evidence was outweighed by the danger of prejudice. Id. The *Lykken* Court upheld the trial court's decision, reasoning the photos and tapes did not depict *similar* events to what occurred during the alleged rape, so there was little probative value. Id.

The present case stands in stark contrast to *Lykken* and other cases under the Rape Shield Law. Here, this law was not used *for* S.O. to prevent harassment or embarrassment to her (*i.e.* a shield) for unrelated sexual matters. It was used *against* Van Der Weide (*i.e.* a sword) to exclude related

sexual matters proving consent. His defense was that he understood S.O. consented because she told him to get the sex toys, as was normal for their sexual behavior together. The Rape Shield Law permits this type of evidence at trial to prove consent, and the circuit court erred in preventing Van Der Weide from admitting this evidence.

b. Violation of S.D.C.L. § 19-19-412(b)(1)(C)

The Rape Shield Law also does not allow the exclusion of evidence that would violate a defendant's constitutional rights. "The Confrontation Clause of the Sixth Amendment to the United State Constitution, as applied to South Dakota through the Fourteenth Amendment, requires that in all criminal cases, the defendant has the right 'to be confronted with the witnesses against him.'" U.S. Const. amend. VI; *State v. Spaniol*, 2017 S.D. 20, ¶24, 895 N.W.2d 329, 338 (quoting *Crawford v. Washington*, 541 U.S. 36, 124 (2004); *State v. Davis*, 401 N.W.2d 721, 724 (S.D. 1987)). "This right is 'generally satisfied when the defense is given a full and fair opportunity to probe and expose a witness' infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.'" *Id.* (quoting *United States v. Owens*, 484 U.S. 554, 588 (1988)).

Here, the circuit court denied Van Der Weide a full and fair opportunity to expose significant infirmities in S.O.'s allegation when it prohibited Van Der Weide from asking S.O. any questions about the sex toys.

This was a violation of his constitutional right to confront and cross-examine the witness. S.O. made several inconsistent statements regarding the sex toys. First, she told law enforcement over and over no sex toys were involved at all. Eventually, during the second interview, and only after law enforcement repeatedly asked, S.O. finally admitted Van Der Weide did pick up a sex toy, and that she grabbed it from him and threw it in his face. This statement contradicted her prior statements. It also contradicted evidence that law enforcement found all the sex toys in drawers in the apartment. This was even further contradicted at the 412 Hearing when the state said S.O. claimed Van Der Weide did try to use a sex toy in conjunction with *penial penetration*, which had never been disclosed before.

However, when the state decided to not present any evidence that a sex toy was part of the encounter, the circuit court striped Van Der Weide of his right to expose S.O.'s inconsistencies and demonstrate to the jury why "scant weight" should be given to her testimony. By simply not asking S.O. about the sex toys, which she stated was part of the rape, the state was able prevent a credibility challenge to its witness.

The Rape Shield Law is not intended to prevent a defendant from exercising his constitutional right to confront a witness with a prior inconsistent statement. Nor was it intended to allow the state control over credibility attacks by the defense. The purpose of this law is to prevent

harassment or embarrassment of alleged rape victims. Here, it was used to save S.O. from a credibility attack regarding her own statements.

This error was even further highlighted when S.O. testified on cross examination that she did not grab anything during the incident. This statement, made under oath, in front of the jury, directly contradicted her prior statements that she did grab for a sex toy and throw it in Van Der Weide's face. When Van Der Weide attempted to impeach that statement through Officer Krebs, he again was prohibited from any mention of sex toys or objects in general.

Again, the circuit court continued the prohibition of this information by only considering whether the state needed the evidence to prove its case:

> I can understand why the defense thinks – again, bringing that up would be relevant, may go to credibility, but I previously ruled more than once now that if that is not brought up in the State's case in chief and it's not an element that needs to be met, a reasonable doubt can go to the jury to find the defendant guilty – it's not a material element – then any probative value is highly outweighed by the prejudicial effect and I believe those items would fall under the rape shield law.

CR 603. The circuit court continued to only think about this evidence in terms of what the state needed to prove its case, and not about how Van Der Weide was allowed to defend himself. Because of this, S.O.'s inconsistent statements were allowed to stand, and the jury never heard legitimate reasons to question her credibility.

This case was "he said/she said" and the credibility of both witnesses was the crux of trial. The circuit court entirely prohibited Van Der Weide from attacking S.O. credibility and confronting her inconsistent statements. S.D.C.L § 19-19-412(b)(1)(C) specifically allows evidence impacting a defendant's constitutional rights, and the circuit court erred in barring Van Der Weide from confronting S.O. regarding her credibility.

c. Abuse of discretion to admit portions of messages.

Finally, the circuit court abused its discretion in allowing the state to cross examine Van Der Weide on incomplete text messages that were confusing and misleading. Due to the circuit court's rulings under Rule 412, Van Der Weide was unable to contextualize these messages, rendering him crippled in defending against the cherry-picked statements the state presented to the jury. Additionally, the full context of the messages was never entered into evidence or presented to the jury[13].

[13] At the 412 hearing, the defense sought to enter these messages into evidence, but the circuit court admonished Van Der Weide that if he did so, it could open him up to further prosecution, and he withdrew his request. Because the messages were never entered into evidence, the exact content of them is unknown. However, when the state cross examined on these messages it claimed were "sex for rent," the messages seemed instead to depict discussion whether they were roommates that do not have sex and each should pay rent or are in a relationship and therefore should be having sex. CR 694-95. That is not evidence of other criminal activity by Van Der Weide, and the circuit court's admonishment against further criminal charges caused Van Der Weide to not offer the messages that were later used against him but never entered into evidence.

Despite repeated objections and Van Der Weide continually saying those messages were taken out of context, the state was allowed to cross-examine on portions of a conversation that occured days before the alleged rape when S.O. and Van Der Weide were discussing their relationship. The circuit court already stated Van Der Weide could not discuss any infidelity on the part of S.O., any details related to prior relationship issues between the two, including prior protection orders, or any details regarding the custody of their child. Van Der Weide's own confusion was evident in the record when he asked "Do I just say quiet for those then?" in relation to answering question the circuit court said he could not talk about. CR 676. Van Der Weide was cross examined on messages regarding sex and rent money, but was never allowed to present to the jury S.O. statements about providing Van Der Weide sex if he bought her things. Messages painting Van Der Weide in a poor light came in, and messages that would put S.O. in the same light were not.

Once again, the Rape Shield Law was used to prevent Van Der Weide for adequately defending himself against these partial conversations. S.D.C.L. § 19-19-106 provides:

> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time.

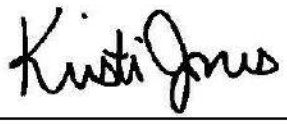
This rule of fairness is to allow the jury the full context of statements to consider, because a full context is vital to make an accurate judgment on a situation. In this case, Van Der Wedie never entered the full context of the messages likely for several reasons, including threat of criminal prosecution and repeated blocks of entering certain evidence under the Rape Shield Law. These messages were incomplete, unclear, misleading, and hand-selected by the prosecutor to paint Van Der Weide in a poor light. Here, the circuit court exercised its discretion to an end or purpose not justified by, and clearly against, reason and evidence.

CONCLUSION

The circuit court erred in its application of the Rape Shield Law and subsequent rulings regarding Van Der Weide's ability to cross examine S.O. and evidentiary rulings in admitting partial, incomplete messages. Accordingly, Van Der Weide requests this Court reverse and remand for a new trial.

Dated this 17th day of May, 2023.

Respectfully submitted,
DAKOTA LAW FIRM, PROF. L.L.C.
KRISTI L. JONES



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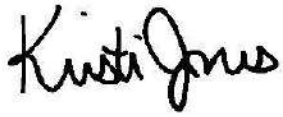
CERTIFICATE OF COMPLIANCE

1. I certify that appellant's brief is within the typeface and volume limitations provided for in S.D.C.L. § 15-26A-66(b) using Century Schoolbook typeface in proportional 12-point type. Appellant's brief contains 8,616 words.
2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.



Kristi Jones
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of May, 2023 a true and correct copy of the foregoing brief was served on the Attorney General's Office via email to atgservice@state.sd.us.

Kristi Jones
Attorney for Appellant

1 DOC 001

STATE OF SOUTH DAKOTA) :ss
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

State of South Dakota,

Plaintiff,

vs.

Keaton A. Van Der Weide,

Defendant.

CRI. 21-843

Judgment and Sentence

An Indictment was filed with the Court on the 1st day of September, 2021, charging the Defendant with Count 1: Rape, Second Degree, SDCL 22-22-1(2), a class 1 Felony.

The Defendant appeared for arraignment on the 13th day of September, 2021 pro se, and the State was represented by prosecuting attorney Alison D. Nelson. A plea of not guilty was entered and the matter was scheduled for further hearing.

On the 23rd, 24th and 25th days of day of February, 2022, the Defendant returned before the Court with attorney Nicole Griese, and the State was represented by prosecuting attorneys Amanda D. Eden and Thomas R. Wollman. On said dates, a jury trial was held.

On the 25th day of February, 2022, the Defendant was found GUILTY of:

Count 1: Rape, Second Degree, SDCL 22-22-1(2), a class 1 Felony.

It is therefore, ORDERED, ADJUDGED and DECREED, that a Judgment of Guilty shall be entered, in that on or about the 13th day of June, 2021, in the County of Lincoln, State of South Dakota, Keaton A. Van Der Weide did commit the public offense of:

Count 1: Rape, Second Degree, SDCL 22-22-1(2), a class 1 Felony.

SENTENCE

On the 13th day of May, 2022, the Defendant returned to court with attorney Nicole Griese, and the State was represented by prosecuting attorney Amanda D. Eden and the Defendant was sentenced. The Court asked the Defendant if any cause existed to show why Judgment should not be pronounced. There being no cause offered, the Court pronounced the following sentence.

IT IS ORDERED AND ADJUDGED by this Court that the Defendant, Keaton A. Van Der Weide, shall be imprisoned in the South Dakota State Penitentiary for a period of 20 years, with

10 years of the sentence suspended upon the following conditions:

(1) The Defendant shall comply with the terms of parole.

(2) The Defendant shall pay $116.50 in court costs and reimburse Lincoln County for an amount to be determined for the psycho-sexual evaluation, $54.65 for transcript fees and $8,642.30 in attorney fees. Said monies shall be repaid on a payment schedule established by parole services.

(3) The Defendant shall receive credit for 89 days previously served.

(4) The Defendant is remanded immediately to the Lincoln County Sheriff to begin his sentence.

(5) The Defendant shall have no contact with Samantha Owens for a period of 10 years with the exception of electronic communication for necessary correspondence relative to the shared minor child.

(6) The Defendant shall follow through with any sex offender recommendations.

(7) The Defendant shall not have any arrests for class 1 misdemeanors or higher.

Dated this 27 day of May, 2022.

BY THE COURT:

Rachel R. Rasmussen - Circuit Court Judge

ATTEST:
Brittan Anderson, Clerk of Courts
BY:

(SEAL)
Deputy Clerk

STATE OF SOUTH DAKOTA)
)
COUNTY OF LINCOLN)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

KEATON VAN DER WEIDE,

Defendant.

Jury Trial
Day #1 after jury selection

CR 21-843

BEFORE: THE HONORABLE RACHEL R. RASMUSSEN
Circuit Court Judge
Canton, South Dakota
February 23, 2022.

APPEARANCES:

For the State: Tom Wollman
Amanda Eden
State's Attorney's Office
104 N Main St #200
Canton, SD 57013

For the Defendant: Nicole Griese
Attorney at Law
311 S Phillips Ave
Ste 201
Sioux Falls, SD 57104

Anything else either party wants so the record is clear regarding evidence and this being bag in brought into evidence?

MS. GRIESE: No.

MS. EDEN: No, Your Honor.

THE COURT: All right.

Then, Ms. Griese, you wanted to make a record outside of the presence of the jury so I will go ahead and let you do that at this time.

MS. GRIESE: Thank you, Your Honor.

I was going into the line of questioning of whether -- when Officer Krebs had interviewed her whether she claimed to have ever grabbed anything or threw anything back at Keaton. We approached off the record and the Court noted that that previously had been ruled on that only if the State was going to introduce the sex toys could we talk about it. I wanted to introduce it specifically because Samantha Owens testified here today that, no, she never threw anything at him. So it goes to her credibility that she did previously claim to throw something at him and Officer Krebs would be one to testify to that.

THE COURT: Ms. Eden.

MS. EDEN: Thank you, Your Honor.

If I remember the line of questioning that the defense counsel engaged in, she was asking her about fighting back

and reaching for objects. I guess I understand that would mean like weapons or anything like that, and the answer to that question is no. She didn't grab a lamp or anything like that to throw at him. So no clarification questions were ever brought up and the State never introduced any testimony regarding her removing the sexual object from his possession. We just didn't go into that. I think that's what my understanding of the Court's ruling was that if the State went into that, they then -- the State went into that then defense counsel could go into it. I understand that defense counsel believes she was inconsistent, but I don't think enough clarification questions or anything of that nature had opened the door to any conversations such as that for either purposes of introducing those objects, or impeaching her credibility, Your Honor, so I'd ask that the Court maintain its previous ruling and not allow the defense to go into it.

THE COURT: Ms. Griese.

MS. GRIESE: I didn't use the word sex toy because I didn't think it had been opened, so I was more vague in saying, did she grab at anything, any objects. I think I might have mentioned weapons, but I did say objects. She said no. And the anticipated testimony of Officer Krebs is that she grabbed the sex toy and threw it in his face and that was where I was going with the line of questioning.

THE COURT: During the bench conference you had indicated to the Court that you believe you could ask about the sex objects.

MS. GRIESE: I mention of the -- well, I was asking him about the grabbing or throwing anything is where I was trying to get. I know it's going to come out as sex object.

THE COURT: Then you can't elicit anything you know the Court has already ruled on.

MS. GRIESE: I'm not -- I'm just trying to get out that she said she didn't grab anything and he would be able to say she did which is directly inconsistent with her testimony.

THE COURT: But you also want to introduce that this object was a sex item; correct?

MS. GRIESE: If there's a way to elicit it without that being introduced, I'm fine. My main thing here is she said she never grabbed or threw anything and he's going to be able to say she did claim she did previously.

THE COURT: I apologize. I don't believe I'm getting a consistent read. When you were up at the bench and you were asking to go down the line of questioning -- at that point in time, you indicated that you believed you could bring up the sex objects and sex toys. I advised that pursuant to my prior ruling based upon what the State needed to put forth before that would become relevant that that had not been done, so that wasn't relevant. So at that point when you

were at the bench and we were in the middle of taking his cross-examination testimony, you wanted to introduce the sex toy -- or sex object. So that was why my ruling was at that point in time what it was. I can't go back and undo that because now you want to do that. Because now you want to -- just want to introduce it just for the credibility and don't want to mention sex toy, even though you said again, you think it would come up in his response.

MS. GRIESE: When I responded at the bench, Your Honor, I said that it was a credibility issue for the reason that I want to bring it up based on the inconsistent statement.

THE COURT: I understand that but not every inconsistent statement can come in based on that balancing of probative and prejudicial, especially with the 412 hearings that we've had and the rulings that I've made. I can understand why the defense thinks -- again, bringing that up would be relevant, may go to credibility, but I previously ruled more than once now that if that is not brought up in the State's case in chief and it's not an element that needs to be met, a reasonable doubt can go to the jury to find the defendant guilty -- it's not a material element -- then any probative value is highly outweighed by the prejudicial effect and I believe those items would fall under the rape shield law.

Regarding just asking a question about credibility, Ms. Eden, anything on that?

STATE OF SOUTH DAKOTA)
)
COUNTY OF LINCOLN)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

KEATON VAN DER WEIDE,

Defendant.

Jury Trial
Day #2

CR 21-843

BEFORE: THE HONORABLE RACHEL R. RASMUSSEN
Circuit Court Judge
Canton, South Dakota
February 24, 2022.

APPEARANCES:

For the State: Tom Wollman
Amanda Eden
Deputy State's Attorney
104 N Main St #200
Canton, SD 57013

For the Defendant: Nicole Griese
Attorney at Law
311 S Phillips Ave
Ste 201
Sioux Falls, SD 57104

A June 13th is the date in question.
Q Okay. So in the days between that, you two actually communicated more than just those two pages; right?
A I don't recall.
Q Do you remember giving your attorney a bunch of text messages between those days?
A Those specific days in question, June 9 and June 10?
Q No. Between June 10 and June 13. Do you remember giving those to your attorney?
A I believe so, yes.
Q Okay. In fact she referenced them earlier when she said you guys had been communicating in the days up to that. You remember that; right?
A Yes. Yes.
Q Okay. And so I want to talk to you about the day after that. So that's June 10th. June 11th, on those days, there's pretty graphic texts about you wanting sex from her. Do you remember those texts?
A I do not.
Q Okay. I'm going to show you a copy of them. Okay?
A Please.
Q Take a second to look at that.

Does that look like it's June 11th?

A Friday, June 11th.
Q We're going to talk about those for a while. Okay.

As you read through the pages that follow that, do you see where you're telling her you want sex?

A Yes.

Q Okay. Do you see the parts where she's telling you she does not want sex. She wants to go somewhere else?

A Um, I do see where it says it doesn't have to be me.

Q All right. Okay. At one point on those as you look through them, you tell her after she tells you she wants to go have sex somewhere else she tells you, quote, if you love me, we wouldn't have this issue. You should want sex. It shouldn't be this one sided all the time when it comes to this matter.

Do you see that text message in the days lading up to that June 11th date?

A That's correct. I do see that.

Q Yeah. You sent that to her?

A Yes.

Q And in response to that text, she tells you that she's actually packing her stuff up and she's leaving. Do you see that where she's packing her stuff up?

A I do see that, yes.

Q Then you mock her for wanting to leave. Do you see that part?

A I'm turning the page. One second.

MS. GRIESE: Objection. Argumentative.

THE COURT: You can rephrase, Ms. Eden.

MS. EDEN: Okay.

BY MS. EDEN:

Q You tell her, so quick to want to run away. And you say I'm being manipulative. I tell you how it is: We fuck. End of story.

Do you see that specific text?

A Yes. But it's not really in that proper context. With text messages it takes the tone of voice out of it. It's not meant to be like that.

Q But it does say, I tell you how it is. We fuck. And end of story. Does it say that? Do I have that right?

A If you read into the -- all of the messages it makes more sense.

Q The messages?

MS. GRIESE: Objection. Are we offering this into evidence or...

MS. EDEN: I'm not offering it at this time.

MS. GRIESE: Okay.

THE COURT: Overruled.

BY MS. EDEN:

Q Her response again is she doesn't want to have sex with you. You need to have it with someone else; right? Do you see that?

A Not necessarily. But to the lines that kind of make sense,

yeah.

Q Well, her response is, for the love of God, find someone else to stick your dick into. For fuck sake. She can take my fucking room and you have half of the rent.

Do you see her telling you that?

A Yes, I do see that.

Q Okay. And then you try to tell her what a roommate. Good job. Do you see that? It's right below. It says exactly. You can't do your half of things that it takes to make a relationship work. We're roommates. Good job.

Do you see that text message?

A I do not. Are you on the same page as me?

Q The one right before that we just read off where you said you saw it. You don't see that? Let me help you.

A Am I on the right page?

Q Yep. It's actually right there.

Exactly. You can't do your half of things that it takes to make a relationship work. We're roommates. Good job. Do you see that text message in front of you?

A Yes, I do.

Q Then she said. Roommates don't fuck. Do you see that?

A Yes.

Q But you said, but they do. Especially onces that don't pay the rent.

Do you see that text message?

A I do see that, yes. But there are emojis that are involved in that also which is -- if you leave that out taking out of context.

Q Let's talk about the emojis. What is the first emoji?

A Eggplant.

Q What's the one right after that?

A Um, looks like a guy with his hands up and a fist bump.

Q What's the eggplant emoji mean?

Do you know that it's common for an eggplant refers to a penis or are you not aware of that?

A I'm aware of it and it can refer to other things and I can't continue.

Q It can mean a penis; right? Can it mean a penis?

A It can mean a lot of things.

Q Okay --

A As far as using it --

Q So my next question is -- I'm sorry -- she said, no, they don't. Pretty sure I helped that out financially. Do you see that?

A On the next page, I do see that.

Q Yup. You said right after that, come back to me when you're ready to go 50/50. Do you see that?

A I do see that.

Q Then says, I'm just done. I'm starting packing.

A Yes, this is typical arguments.

Q Okay. But she says that; right?
A Yes.
Q She said I'm just done. I'll start packing.
Your response is why, though. It makes no sense. Why?
Do you see that? Do you see that text?
A I do see that.
Q Then her response is, it does. I'm not a piece of ass.
Do you see that text message in the middle of that page in front of you?
A You are forgetting some of the message.
Q Please show me.
A You forgot the argument is invalid. You only read the top of that message.
Q I was reading hers. It says I'm not a piece of ass.
Do you see that message?
A Yes. Yep.
Q Your response is how can you be piece of ass when I don't get no ass? FFS. Your argument is invalid.
Do you see that?
A I do see that.
Q That's -- you sent that to her; right?
A Typical argument talk between the two of us.
Q But you sent it to her; right?
A That's correct.
Q Okay. And then she responds, it's how you treat me.

Do you see that?

A I do.

Q And your response is, what can you do that will make me treat you better, question mark, period, I'll answer it for you, comply with your -- and it looks like pussy. And then you corrected it to p-u-s-s-y because it was misspelled.

Do you see that?

A I do.

Q Can I have those and the exhibits please. Thank you.

Those texts messages that we went through, those were on the 11th to like 24 to 48 hours before the incident on the 13th; is that right?

A I believe so.

Q And it appears that you want her to have sex with you but she keeps telling you to go somewhere else; right?

A Pretty consistent with how the past two months had been, right.

Q How the 13th went as well?

A No.

MS. EDEN: Nothing further, Your Honor.

THE COURT: Redirect, Ms. Griese.

MS. GRIESE: Yes. Thank you.

REDIRECT EXAMINATION

BY MS. GRIESE:

Q Um, we talked before about being nervous. Is it hard when

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30028

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

KEATON VAN DER WEIDE,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA

THE HONORABLE RACHEL RASMUSSEN
Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal filed June 22, 2022

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 30028

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

KEATON VAN DER WEIDE,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Plaintiff/Appellee, State of South Dakota, is referred to as "State." Defendant/Appellant, Keaton Van Der Weide, is referred to as "Defendant." The settled record in the underlying case is denoted as "SR" and the transcripts are cited as follows:

Motions Hearing, February 3, 2022 ..... MH2
Motions Hearing, February 17, 2022 ..... MH3
Pretrial Motions Hearing, February 23, 2022 ..... PTM
Jury Trial Day 1, February 23, 2022 ..... JT1
Jury Trial Day 2, February 24, 2022 ..... JT2

All references to documents will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

On May 27, 2022, the Honorable Rachel Rasmussen, Circuit Court Judge, Second Judicial Circuit, entered a Judgment and Sentence in *State of South Dakota v. Keaton Van Der Weide*, Lincoln County

Criminal File Number 21-843. SR:292-93. Defendant filed his Notice of Appeal on June 22, 2022. SR:297. This Court has jurisdiction under SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. WHETHER THE CIRCUIT COURT ERRED IN ITS APPLICATION OF THE RAPE SHIELD LAW?

The circuit court did not rule on this issue.

State v. Bausch, 2017 S.D. 1, 889 N.W.2d 404

State v. Letcher, 1996 S.D. 88, 552 N.W.2d 402

State v. Lykken, 484 N.W.2d 869 (S.D. 1992)

STATEMENT OF THE CASE AND FACTS

Background and Investigation

Defendant and the victim, S.O., met and began dating in 2017. JT2:24. Over the next four years, the couple had an "on-again-off-again relationship" that included the birth of a child and two engagements. JT2:24-25. In May 2021, Defendant and S.O. were living together in an apartment with their daughter in Beresford. JT1:13. S.O. said she and Defendant broke up and she moved to the spare room. JT1:13. S.O. made plans to move out of the apartment on Sunday, June 13, 2021. JT1:14-15. The night before, S.O. went out with some friends and did not return to the apartment until around 9:00am. JT1:16-17. Defendant was at the apartment and sat next to S.O. on the couch after

she arrived. JT1:17-18. S.O. briefly spoke on the phone with her friend, Addie. JT1:41. Afterwards the rape occurred.

After the rape, S.O. put on pants, left the apartment building, and called her friend, Addie. JT1:20-23. S.O was crying and told her that Defendant raped her. JT1:41-42. Addie told S.O. to meet her at an interstate exit outside of Beresford. JT1:42. When Addie and S.O. met, Addie told S.O. that S.O. needed to call her parents, the police, or both. JT1:23. Addie called the police, while S.O. called her mother. JT1:23.

Officer Krebs arrived at the exit and interviewed S.O. SR:263. S.O. said when Defendant started kissing her, she told him "no" and pushed him away. *Id.* Defendant continued to kiss S.O. and pinned her to the ground as she was yelling "no." SR:263. Defendant took S.O.'s shorts off in the living room, but she got away from him and went to her room. Defendant followed S.O., pinned her down again, removed his shorts, and penetrated S.O.'s vagina with his penis. SR:263. S.O. said she slapped Defendant and bit his arm. S.O. reported she and Defendant last had sex two months prior. Officer Krebs sent S.O. to get a medical exam and explained he wanted to complete a more detailed interview with her later. SR:263.

S.O. travelled to Sioux City where a sexual assault exam was completed. JT1:24-25. In the meantime, law enforcement located Defendant and he agreed to go to the police station for a consensual interview. SR:264. Defendant said he and S.O. had been having

relationship problems for the past month and a half. He reported S.O. had been sleeping in a different room most of the time and had packed her belongings to move out of the apartment. SR:264. Defendant's timeline from the night before and the morning of June 13th was consistent with S.O.'s along with his description of what S.O. was wearing. SR:264-65.

With regard to the sexual intercourse, Defendant explained he and S.O. had a good conversation on the couch and then had "make-up sex." SR:265. Defendant claimed they often argued and then had make-up sex afterwards. When asked for specifics, Defendant said he and S.O. took her shorts off and then he penetrated S.O.'s vagina with his penis. SR:265. Defendant stated he also penetrated S.O. with a sex toy, claiming S.O. liked to use sex toys and often asked him to penetrate her with his penis and sex toys at the same time. SR:265. He claimed two toys were used and S.O. used one on herself. *Id.*

When asked if the intercourse was rough, Defendant explained that S.O. "liked it rough" and he may have pulled S.O.'s hair and bit her butt. SR:265. Defendant claimed he did not bite her very hard. Defendant did not have any bite marks on his arms. SR:265.

Defendant claimed the sex started on the couch and continued on the living room floor. SR:265. When asked about the bedroom, Defendant said they only went in there to get S.O.'s sex toys. SR:265. Defendant showered after they were finished. SR:265. He said he was

confused when he got out of the shower and S.O. was gone. SR:265-66. S.O. texted him and told him not to contact her again and that she was calling the cops because she told him to stop. SR:265-66. Defendant told the officer that S.O. never told him to stop and suggested S.O. could be accusing him so he would not fight for custody of their child. SR:265-66.

Defendant said S.O. had accused him of things before to "make his life hell," referring to a prior no-contact order that was entered based on an allegation that Defendant hit S.O. SR:266. Defendant agreed to provide a DNA sample and to let the officers come to the apartment to collect S.O.'s clothing and sex toys. SR:266. Defendant went to the apartment and identified the sex toys that were used. Defendant also suggested the officer take all of the sex toys so people could see what S.O. typically used during sex. SR:266. Defendant pointed out the shorts S.O. was wearing, which were in the bedroom. SR:255.

The day after the rape, law enforcement again interviewed S.O. SR:267. S.O.'s report was similar to the first interview, but she added that Defendant put his finger in her anus and vagina, along with putting his penis in her vagina. SR:267-68. S.O. said she was trying to make a lot of noise during the rape and told Defendant to stop. SR:268. Defendant told her to "shut up and take it." SR:268. S.O. denied Defendant penetrated her with any sex toys. SR:269. She reported

they had consensually used sex toys previously, but that he did not use one on the 13th. SR:269. S.O. explained that Defendant grabbed for a sex toy while they were in her room, but she grabbed it away from him and threw it at his face. SR:269.

On September 1, 2021, a Lincoln County Grand Jury indicted Defendant on one count of second-degree rape, in violation of SDCL 22-22-1(2). SR:1. The two main topics central to this appeal are 1) sex toys, relevant to Issues I(A) and I(B), and 2) text messages, relevant to Issue I(C).

Sex Toys

Prior to trial, Defendant filed an Amended Motion to Disclose Evidence Pursuant to SDCL 19-19-412(b)(1)(B), declaring his intention to elicit testimony related to he and S.O.'s sexual relationship and preferences. SR:62-63. The trial court's key rulings on the motion were:

1. The history of the domestic relationship and prior consensual sex between S.O. and Defendant was relevant and not overly prejudicial. MH2:7-8.

2. References to the use of one sex toy on the day of the allegation and testimony related to what was "normal" for the couple was relevant because the allegations included the use of one sex toy. Specific instances about prior use of sex toys was not admissible because it could confuse the jury and would be more prejudicial than probative. MH2:15-17.

3. Testimony about S.O.'s preference to have Defendant use a sex toy in conjunction with penile intercourse was relevant if the preference was also part of the allegations on the day of the rape. MH2:18-19.

4. Because there was no allegation that the events were videotaped, testimony related to prior videotaping would not be material to what the jury needed to decide and, thus, was not directly relevant. Also, the testimony would be highly prejudicial to the victim and would confuse the jury. MH2:20.

5. References to prior intercourse that included Defendant penetrating S.O. from behind were relevant. References to any other positions were not relevant because they were not similar to the allegations. References to other positions could also mislead the jury and humiliate the victim. MH2:23-24.

6. Snapchat messages about S.O. engaging in sexual intercourse with a third-party thirty-six hours prior to the allegations were not directly relevant to any material issue the jury needed to determine during trial and they would create a sub issue. However, Defendant was allowed to say an argument occurred and he and S.O. were making up during the event. MH2:26-27.

In ruling on the motion, the court reasoned that prior sexual relations between S.O. and Defendant were "limited to both what's relevant as to consent and to the allegations that are being put forth against the defendant in his trial." MH2:20, 27.

Defendant also filed motions and a brief seeking to admit specific sex toys, or in lieu, pictures of the sex toys, into evidence during the trial. SR:66-71, 114-17. He argued the sex toys were res gestae evidence and supported his position that the sexual intercourse in question was consensual. SR:68; MH3:6. Defendant also focused on purported discrepancies between S.O.'s first interview, where she did not mention sex toys, and her second interview where she reported Defendant tried to grab a sex toy and she threw it at him. MH3:7.

Defendant argued the use of the sex toys, especially in conjunction with penile penetration, required different amounts of consent and the jury needed to see the size of the toys to determine how the sex toys were used and whether the alleged acts could have happened consensually or forcefully. MH3:8-10.

The State opposed introducing the toys or pictures and asserted Defendant was just trying to humiliate S.O. MH3:10-11. The State explained the victim was going to testify that when she was crawling away from Defendant, he attempted to grab a sex toy and she threw it at him. MH3:13-14. The State also clarified that the allegation of rape was based on penial and digital penetration and Defendant only attempted to use the toy with the penial penetration. MH3:15-16.

The court explained that whether the object was used to commit the assault or "whether it was a perfory item the State doesn't intend on using to prove its case in chief" makes a difference. MH3:16. The court recognized that Defendant has a right to present a defense, including a defense of consent. MH3:17. However, the court also noted that:

> This is a one-count indictment. The State intends to bring up both penile as well as digital penetration, and again, mention that [the sex toy] was attempted to be used during the course of the rape. Whether or not this sex object was used or not used does not directly determine whether or not the rape happened or didn't happen. I am drawing a distinction there as the State's alleging one count of rape, there was penile penetration. They're going to elicit testimony of digital penetration as well. The attempted penetration with this sex object does not ultimately determine whether or not the other instances happened. . . Whether or not it was used, what size it is, what material it is would not

> necessarily change whether not this was a rape or consensual encounter. I previously ruled and I still believe that, if the State asks about such an object being used, that the defense can also ask about that object being used.

MH3:17-18. The court reasoned that allowing Defendant to elicit testimony about the sex object on cross examination would afford him the right to confront the victim on the allegations made against him and would allow him to put on his consent defense. MH3:18.

As to actually offering the sex toys or pictures, the court ruled these would only provide minimal probative value and would be substantially outweighed by prejudicial effect. MH3:18. The court found that it would result in needless presentation of evidence and confuse the jury as to which act the State may be moving forward on because the State was not alleging the sex object was part of the crime. MH3:18.

Prior to jury selection, the parties discussed an order about the Rule 412 evidence and the court said it wanted to examine the order before signing it. PTM:12-13.[1] The court clarified that, whether the parties previously used sexual devices or whether they had consensual sex in a certain position was relevant, but any preferences were not. PTM:12. The court further explained that, because the defense is consent, prior specific instances are allowed as far as what was normal

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[1] Neither the proposed nor signed order is in the record.

for their relationship, but the court did not want the defense to go into what S.O. preferred. PTM:12-13.

On direct examination, S.O. testified about her relationship with Defendant and asserted their relationship was over at the time of the rape. JT1:12-16. On the morning of the rape, S.O. stated she and Defendant were sitting on the couch talking and then he started kissing her. JT1:18. She explained she told him no, but he didn't stop. He became more forceful and took off her shorts. S.O. stated that, as she tried to crawl away from Defendant, he put his finger in her anus and tried to force himself upon her. JT1:19. S.O. was able to get to the bedroom, but then Defendant penetrated her vagina with his penis. S.O. was crying and begged him to stop. JT1:19. S.O. did not testify that Defendant grabbed for a sex toy or that she threw it at him.

On cross-examination, defense counsel asked S.O. about the rape and what she did to get away from Defendant. JT1:36. S.O. said she tried to crawl away and slapped as well as bit Defendant. Defense counsel asked S.O. if she grabbed for her phone or a weapon and S.O. said no. Counsel then asked S.O. if she told the police that she grabbed for something in the bedroom. S.O., again, said she did not grab for anything. JT1:36.

Officer Krebs, who conducted both interviews with S.O. and the interview with Defendant, testified at trial and he reiterated much of what Defendant and S.O. said in their interviews. JT1:63-73. Officer

Krebs said that S.O.'s version of facts was mostly the same and explained that he conducted a short interview with her the first time so she could seek medical attention. JT1:63-64, 73-74.

On cross-examination, Officer Krebs stated S.O. told him she bit and slapped Defendant and then explained that he did not find any bite or slap marks on Defendant. JT1:78. Officer Krebs said Defendant was cooperative with him, went to the police station voluntarily, willingly gave a DNA sample, showed Krebs the messages S.O. has sent him, and offered to let Krebs into the apartment so he could collect evidence. JT1:79. Counsel asked if Defendant reported why he and S.O. were in the bedroom and asked if S.O. requested Defendant get something the couple used consensually during sex. JT1:80. The State requested to approach the bench. The court heard short arguments from the parties and then said the defense could make a record after cross-examination was complete. JT1:80. Officer Krebs confirmed that S.O. did not have any cuts, bruises, or marks and then defense counsel ended her cross-examination. JT1:81-82.

Outside the presence of the jury, Defense counsel argued S.O.'s testimony that she did not grab for anything was inconsistent with what she said in her interview with Officer Krebs—i.e. that Defendant grabbed for a sex toy and S.O. grabbed it and threw it at him. JT1:86-87. The State argued that defense counsel was asking about weapons and did not give S.O. an opportunity to clarify. JT1:89-90. The court

determined that defense counsel was not allowed to cross-examine Officer Krebs about S.O.'s alleged prior inconsistent statement because the statement was not inconsistent with her testimony. JT1:92-93. The court also noted the testimony sought from Officer Krebs would be in violation of the court's prior order. JT1:92-93. The court explained that whether S.O. threw something at Defendant "was not ultimately a material issue [sic] for what the jury needs to determine" and could lead to confusion and humiliation if S.O. needed to come back to the stand. JT1:93-94.

Before Defendant testified, the court informed him he was subject to the court's prior rulings and was expected not to testify about those things. JT2:14-15. The State asked if that meant he could not testify about sex toys since the State did not bring them up in their case-in-chief; the court said "yes." JT2:15.

Defendant testified he and S.O. were working on their relationship and were going to relationship counseling. JT2:27-33. Defendant explained the two would often fight and break up for a few days and then get back together and have make-up sex. JT2:34. He said when S.O. returned to the apartment on the morning of June 13th, he and S.O. sat on the couch and talked about whether they were still compatible and whether they were going to do what their counselor suggested. JT2:36. Defendant explained he started rubbing S.O.'s leg,

told her that he loved her, and then they jointly started undressing. JT2:37.

When asked if the phone rang, Defendant replied: "Her phone started ringing shortly after we had started and that's when her phone started ringing. She said she needed to answer that. I told her -- or -- I told her that's fine. And then she told me to go to the bedroom and grab an undisclosed object." JT2:37. The State objected, and the court sustained the objection. JT2:37. Defendant went on to explain that they continued having sex after the phone call ended. When asked if they went into the bedroom, Defendant explained they went into the bedroom four or five minutes afterwards. Defendant said "Mainly just to grab. . . " and the State objected. The court sustained the objection and said "Mr. Van Der Weide, please remember the admonishment I gave you." JT2:37.

Defendant denied that S.O. was yelling or screaming and testified that she did not tell him to stop. JT2:38-39. He also denied that she tried to get away from him, through biting, slapping, or otherwise. JT2:38-39. When asked why S.O. was accusing him of rape, Defendant replied: "Well, she said it before. Basically doesn't want to share custody with our daughter, doesn't want me involved in the picture at all. As far as she's concerned, she just wants to be the sole parent and not have to deal with sharing custody." JT2:40-41.

Defendant testified he was confused when the police arrived because he "would never suspect someone [he has] had so many years with to go and pull something like this." JT2:41. Defendant reiterated he was completely cooperative with police and gave them everything they sought. JT2:41-42. Defendant also explained that he was not arrested until three months later. JT2:43.

Text messages

Prior to trial, defense counsel provided the State with a packet of text messages exchanged between Defendant and S.O. MH2:27-29; JT2:3-4. The defense initially wanted to admit portions of the messages but withdrew the packet after advising Defendant, at the request of the court, that text messages about "sex for rent" could lead to other criminal charges. MH2:32; JT2:4.

During jury selection, defense counsel brought up the subject of child custody. PTM:63. The trial court interrupted and engaged in a discussion with both counsels, outside the presence of the jury, about whether child custody was relevant to the case. PTM:64-65. The court ruled that the couple's argument could be brought up, but the reason for the arguments, including child custody, could not. PTM:72.

At the end of jury selection, the trial court revisited its ruling and explained the defendant has a right to present a defense, but that does not mean that everything he wants to bring in is relevant. PTM:90. Defendant explained he wanted to introduce text messages that

occurred during the argument where S.O. says "See you in court over custody. Amelia and I will move back to Minnesota. I have custody of Amelia, you don't. Bye." PTM:91. Defense counsel explained that these messages showed that S.O. had a motive to fabricate the allegations and asserted that preventing the use of the text messages would take away some of the defense. PTM:91.

The court noted that it could not exclude all references to the child because Defendant could not present his defense any other way and credibility was highly relevant. PTM:94. The court ruled that Defendant could bring up the argument between the parties and say it was about where the minor child should go. PTM:94. The defense could also bring up any motive S.O. would have to lie about the location or whereabouts of the child. PTM:95.

During the defense's case-in-chief, Defendant testified and admitted text messages between him and S.O. to show the couple was still working on the relationship and to add to his theory that S.O.'s allegations were motivated by parenting.[2] JT2:6-7; SR:182-86 (Defense Exhibits B, C, D, & E). The court admitted the exhibits with the caveat that the State would be able to cross-examine Defendant about the remainder of the conversations. JT2:11-12.

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[2] These text messages appear to be part of the packet Defendant offered before trial and then withdrew. JT2:4.

During his direct examination, Defendant claimed the relationship issues stemmed from him having to travel for his job. JT2:27. On cross-examination, the State sought to use other text messages to impeach Defendant, arguing that Defendant's explanation of the relationship issues opened the door to cross-examination with text messages showing S.O. ended the relationship because Defendant assaulted her. JT2:58-59. All parties recognized that many of the text messages within the packet referenced subjects the court previously excluded, including sexual relations with other parties, custody of the child, and the prior protection order between Defendant and S.O. JT2:57-60.

The court determined that "information around the day before, day of, and days after the allegations and the present case are relevant" and ruled that Defendant could be cross-examined on his view of why the relationship was strained. JT2:61. However, the court did not want the entire packet of text messages going to the jury because it contained the other previously excluded issues. JT2:61. The court ruled that the State could cross-examine Defendant about other reasons he and S.O. were not getting along, the couple's level of intimacy, and any text messages after the rape but precluded the State from asking about the protection order and details of the alleged assault. JT2:65-66.

The State cross-examined Defendant using the text messages defense counsel admitted and other messages from the packet defense

counsel provided to the State. JT2:73. The State did not offer the packet into evidence and defense counsel agreed she did not want the entire packet of text messages in the record. JT2:63-64. During re-direct examination, defense counsel asked Defendant questions that allowed him to explain the context of the unadmitted text messages the State referenced and asked Defendant questions about the subject of additional unadmitted text messages from the packet. JT2:87-94.

Before the case was submitted to the jury, defense counsel proposed several jury instructions, including one regarding consent, one that described a mistake of fact defense, and one that explained the concept of motive. SR:98-99; JT2:111-19. The State did not object to the consent instruction but did object to the mistake of fact instruction. JT2:111-19. The trial court denied these instructions. SR:147-48, 150; JT2:111-19.

ARGUMENTS

I. DEFENDANT DID NOT SHOW THE CIRCUIT COURT'S RULINGS WERE ERRONEOUS OR RESULTED IN A CONSTITUTIONAL VIOLATION.

A. Application of SDCL 19-19-412, the "Rape Shield" statute.

This Court reviews a circuit court's evidentiary rulings for an abuse of discretion. *State v. Bausch*, 2017 S.D. 1, ¶ 11, 889 N.W.2d 404, 408. An abuse of discretion "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *State v. Delehoy*, 2019

S.D. 30, ¶ 22, 929 N.W.2d 103, 109. To prevail on a challenge to a circuit court's evidentiary ruling, Defendant must show that the court erred and the error was prejudicial. *State v. Little Long*, 2021 S.D. 38, ¶ 49, 962 N.W.2d 237, 255.

1. Defendant has not shown the circuit court abused its discretion in applying the rape shield statute.

South Dakota adopted the federal "Rape Shield" statute, Rule 412, in 2011. SL 2011, ch. 237 (eff. July 1, 2012). In proceedings involving alleged sexual misconduct, Rule 412 prohibits "(1) [e]vidence offered to prove that a victim engaged in other sexual behavior; or (2) [e]vidence offered to prove a victim's sexual predisposition." SDCL 19-19-412(a). In criminal cases, courts may admit "[e]vidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor" and "[e]vidence whose exclusion would violate the defendant's constitutional rights." SDCL 19-19-412(b)(1)(B)-(C).

On appeal, Defendant argues that the circuit court erred in excluding references to Defendant and S.O.'s use of sex toys, including during the rape, pursuant to Rule 412. Defendant's Brief ("DB") at 20-24. In support, Defendant claims the rape shield statute only prohibits *prior* sexual conduct. *Id.* While the prior version of the statute precluded "instances of a victim's *prior* sexual conduct," the new version precludes the admission of evidence "offered to prove that a victim

engaged in *other* sexual behavior. . . [or] a victim's sexual predisposition." SDCL 23A-22-15[3] (emphasis added); SDCL 19-19-412. The two decisions from this Court addressing Rule 412 related to rulings excluding prior sexual conduct. *See State v. Golliher-Weyer*, 2016 S.D. 10, ¶ 10, 875 N.W.2d 28, 32 (reviewing the exclusion of the victim "lying about past instances of sexual behavior."); *State v. Malcolm*, 2023 S.D. 6, ¶ 32, 985 N.W.2d 732, 740 (reviewing the exclusion of evidence of the victim's "prior sexual conduct."). However, unlike the previous rape shield statute, there is nothing in Rule 412 that narrows the exclusion of evidence to that of "prior" sexual behavior. *United States v. Elbert*, 561 F.3d 771, 776 (8th Cir. 2009) (explaining that Rule 412 excludes "any evidence about a victim's sexual behavior unless certain conditions are met."); *United States v. Lockhart*, 844 F.3d 501, 509 (5th Cir. 2016) (affirming the exclusion of the victims' pre and post-indictment sexual conduct pursuant to Rule 412).

If evidence falls under the general prohibition in Rule 412, the court *may* admit the evidence if it fits within one of the narrow exceptions. *Malcolm*, 2023 S.D. 6, ¶ 32, 985 N.W.2d at 740. Notably,

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[3] SDCL 23A-22-15 provided: "In prosecutions for rape, evidence of specific instances of a victim's prior sexual conduct shall not be admitted nor reference made thereto before the jury or jury panel, except as provided in this section. Whenever a party proposes to offer evidence concerning a victim's prior sexual conduct, the court shall first conduct a hearing in the absence of the jury and the public to consider and rule upon the relevancy and materiality of the evidence."

even when evidence falls under one of the exceptions to the rape shield statute, it must still be admissible under the rules of evidence. *See id.* (reviewing the circuit court's application of Rule 412 and noting that the court's rulings based on relevance and hearsay would also sustain the court's exclusion of the evidence). The same is true for evidence that does not fall under the rape shield statute. Indeed, the circuit court is the gatekeeper of evidence and has broad discretion in determining whether to exclude or admit evidence. *State v. Kryger*, 2018 S.D. 13, ¶ 19, 907 N.W.2d 800, 809 (other citations omitted).

In this case, the circuit court allowed Defendant to present evidence that he and S.O. were in a domestic relationship that included prior consensual sex. MH2:7-8. When Defendant sought to introduce evidence of S.O.'s preference to use sex toys during intercourse, the circuit court ruled that whether it was normal for the couple to use sex toys was admissible. MH2:15-16. This ruling was based, in part, on S.O.'s claim that Defendant attempted to use a sex toy while he was raping her. MH2:14.[4] The circuit court reasoned that if a stated preference was similar to the allegations on the day of the rape, prior similar occurrences would be relevant. MH2:15-19. Based on that

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[4] The State's understanding of S.O.'s allegations changed slightly during the pre-trial hearings. Initially the State believed Defendant attempted to use the sex toy during the rape. MH2:14. The State later clarified that S.O.'s claim was that Defendant grabbed for the sex toy and S.O. took it from him and then threw it at him. MH3:13-14.

same logic, the court also ruled that Defendant could reference prior sexual intercourse that included penetration from behind and the couple's history of arguments followed by make-up sex. MH2:23-27.

The circuit court addressed evidence related to the use of sex toys on several occasions and explained that evidence related to sexual relations between Defendant and S.O. was limited to both what was relevant to consent and to the allegations against Defendant. MH2:20 Defendant claims the court was misreading Rule 412 to require evidence be both related to consent and offered by the prosecution. DB at 22. However, in making the 412 rulings, the court relied on both the language of the rule and this Court's decision in *State v. Lykken*. *See e.g.* MH2:20 (citing *Lykken* as a basis to exclude evidence that S.O. previously allowed Defendant to video prior sexual intercourse because there was no allegation that videoing occurred during the event at issue); MH3:16-18.

In *Lykken*, this Court affirmed the exclusion of evidence of prior sexual encounters, including explicit photographs of the defendant and victim, an explicit tape recording made by the victim, and explicit testimony details about various sexual encounters between the defendant and the victim. *State v. Lykken*, 484 N.W.2d 869, 874-75 (S.D. 1992) (adopting the reasoning in *People v. Zysk*, 149 Mich.App. 452, 386 N.W.2d 213 (1986)). This Court explained that "[e]vidence of a rape victim's prior sexual encounters may be admitted if. . . relevant

and material to a fact at issue in the case." *Lykken*, 484 N.W.2d at 874 (quoting *State v. Woodfork*, 454 N.W.2d 332 (S.D. 1990)). The Court then agreed that, because the evidence was different than the activity that occurred during the rape, the evidence of prior sexual acts only had minimal relevance and presented substantial danger of confusion of the issues, unfair prejudice, and needless presentation of cumulative evidence. *Id.*

Relying on *Lykken*, the court seemingly interpreted the "other sexual behavior" restriction in Rule 412 to apply to sexual behavior other than the activity that occurred in the allegations. Thus, the court limited "other sexual relations" between Defendant and S.O. to only those that were related to consent, as required by Rule 412, and material to a fact at issue in the case—i.e. the activity in the allegations—as suggested in *Lykken*. MH2:20, 24. Importantly, the same requirement noted in *Lykken* was recently reapplied to the new version of Rule 412. *See Golliher-Weyer*, 2016 S.D. 10, ¶ 13, 875 N.W.2d at 33 (citing *State v. Pugh*, 2002 S.D. 16, ¶ 14, 640 N.W.2d 79, 83–84, and noting that the defendant failed to show that the evidence related to prior sexual behavior was "relevant and material to a fact issue in the case."). The court reasoned that if the State was not relying on the use of the sex toy to prove the rape, the use of sex toys was not a material element or material issue that the jury needed to decide. JT1:87-88, 94.

Nevertheless, even if the use of sex toys on the day of the rape was relevant, under Rule 401 or Rule 412, the circuit court may exclude relevant evidence if its probative value is substantially outweighed by its prejudicial effect. *See* SDCL 19-19-403 (permitting a court to "exclude relevant evidence if its probative value is substantially outweighed by a danger. . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."). In this case, the circuit court was very concerned with the prejudicial effect of admitting the sex toys themselves or references to sex toys on the day of the rape. MH2:20, 24.

Defendant's statements and actions prior to the trial rightly gave the court pause. First, when the police interviewed Defendant, he made several references to S.O.'s preference to have him penetrate her with his penis and a sex toy at the same time and commented that S.O.'s preference "has to take a toll on her down there." SR:265-66. Then, although Defendant claimed that only two toys were used, he suggested the officer take all of the toys so people could get an idea of what S.O. typically used when having sex. SR:266. At a pretrial hearing, Defendant sought to introduce the sex toys he claimed were used. Defendant's argument, in part, was that the jury needed to appreciate the size of the objects to decide whether their use was consensual or forceful. MH3:7, 9-10. However, S.O. did not allege that Defendant was

actually able to use the sex toys during the rape. MH3:16. Instead, Defendant's insinuation was clear—he wanted to use the size of the toys and S.O.'s alleged preference for using the toys to humiliate her in front of the jury and leave the jury with a bad impression. This is exactly the type of evidence that would have the capacity to persuade the jury by illegitimate means. *Lykken*, 484 N.W.2d at 875 (relying on Rule 403 and explaining that, because the victim admitted to sexual involvement with the defendant, evidence of pictures, tapes, and explicit details "could only have served to inflame the jury so that, feeling no empathy for D.H., they may not have cared whether she was raped".).

In excluding evidence of the sex toys, themselves, and references to use of the toys on the day of the rape, the circuit court explained that the subject of sex toys and whether one was used could also confuse the jury about which act the State was alleging for the single count in the indictment. MH3:18. The court considered Defendant's rights and explained, if the State asked questions about the sex toy, Defendant would be able ask questions as well. The court reasoned that this would allow Defendant to cross-examine S.O. on the allegations and put on his defense of consent through cross-examination. MH3:17-19.

The court also noted the subject was prejudicial to S.O. MH3:18-19; JT1:93-94. It is evident that the circuit court excluded evidence about S.O.'s use of sex toys, in part, to "protect [her] from the humiliation of having [her] unrelated sexual conduct paraded before

[the jury]." *State v. Pugh*, 2002 S.D. 16, ¶ 13, 640 N.W.2d 79, 83. The court's rulings meant "to safeguard the alleged victim against the invasion of privacy, potential embarrassment[,] and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process." *See United States v. Wardlow*, 830 F.3d 817, 820 (8th Cir. 2016). This Court presumes the circuit court's evidentiary rulings are correct. *See Golliher-Weyer*, 2016 S.D. 10, ¶ 15, 875 N.W.2d at 33.

2. Defendant has not shown that the circuit court's rulings prevented him from presenting his defense.

Even if the Defendant could show that the court erred in excluding references to the use of a sex toy on the day of the rape, he has not shown that the rulings prevented him from presenting his complete defense. "Error is prejudicial when, 'in all probability ... it produced some effect upon the final result and affected rights of the party assigning it.'"). *Bausch*, 2017 S.D. 1, ¶ 12, 889 N.W.2d at 408-09.[5]

Defendant's theory of defense was twofold: 1) the sexual intercourse with S.O. was consensual, and 2) S.O. fabricated the

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[5] Defendant claims that the circuit court's alleged misapplication of Rule 412 was an evidentiary error, meaning Defendant would have the burden of proving that any error was prejudicial. The same is true even if Defendant's challenge was based on his constitutional right to present a defense. *Bausch*, 2017 S.D. 1, ¶¶ 13-15, 889 N.W.2d at 409.

allegations to prevent him from seeking custody of their daughter. To support his theories, Defendant cross-examined S.O. about the allegations she testified to at trial, her claim that the relationship was over, her varying timeframes related to the couple's recent intimacy, her differing descriptions of how she tried to get away from Defendant (i.e. crawl versus ran), and why she went to the bedroom instead of out the front door. JT1:31-36. Defendant also asked S.O. questions that highlighted the parts of her story he intended to discredit through other witnesses and exhibits.

On cross-examination with Officer Krebs, Defendant established that Officer Krebs did not find any bite marks on his arm, or any other marks, after the rape. JT1:78. This contradicted S.O.'s claim that she bit Defendant and slapped him in the face. Defendant also introduced S.O.'s shorts and showed the jury that, contrary to S.O.'s characterization, they were not ripped or otherwise torn. JT1:75-77. He argued the amount and type of fabric would make the shorts difficult to remove unless S.O. was staying still and pointed out that they were found in the bedroom, not the living room where S.O. claimed they were taken off. JT1:77, JT2:142.

Defendant cross-examined S.O.'s friend Addie and emphasized that the time between her first call with S.O. and the second call was approximately ten minutes. JT1:47-48. He also established that S.O. did not call 911 until Addie told her to. JT1:48. This testimony

contributed to his theory that S.O. was fabricating the allegations. JT2:141-42, 144-45.

Defendant was also able to tell the jury a different version of the facts than the version S.O. told. Defendant explained the couple's habit of arguing and then having make-up sex and the frequency of their intimate relations. JT2:33-35, 88-90. Defendant admitted text messages he exchanged with S.O. showing they were getting along before the rape and supporting Defendant's theory that he and S.O. were still working on their relationship. JT2:27-35. This theory directly contradicted S.O.'s testimony that she was done and the couple was broken up.

Defendant's testimony about the evening of June 12th and the morning of June 13th was mostly consistent with S.O.'s testimony. However, with regard to the intercourse at issue, Defendant told the jury that the sexual intercourse between the couple was initiated by both he and S.O. and he went into the bedroom, at S.O.'s direction, when she was on the phone with Addie. JT2:37-38.[6] Defendant denied that S.O. screamed, yelled, or tried to run or crawl away from him. JT2:39. Defendant also testified he was not forceful with S.O. and she did not bite him.

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[6] The court sustained the objection to Defendant's use of "unidentified object" but never told the jury to disregard the statement. JT2:37.

Defendant explained his confusion about S.O.'s text messages after they had sexual intercourse and pointed out how he was fully compliant with the officers. JT2:40-42. Defendant told the jury S.O. made up the rape allegations because she does not want him involved with parenting their daughter. JT2:41. He also admitted a text message showing S.O. reached out to him after the rape and asked if he was ok. JT2:43.

On re-direct, Defendant was able to add credibility to his version of events by detailing text messages he sent S.O. making plans for Father's Day after the rape, asking her why she made up the allegations, and telling her to be honest with herself. JT2:94. Defendant also reiterated his theory that S.O. was accusing him of rape so he cannot fight for custody of their daughter. JT2:94.

Defendant called a former neighbor, Emily Jones, who explained that talking and yelling in the building could easily be heard throughout the building. JT2:98-99. This called into question S.O.'s claim that she was yelling and screaming. He also called Alyssa Rusch, the SANE nurse that met with S.O. after the rape. JT2:104. Alyssa explained that she did not remember her interview with S.O., but her notes showed that S.O. reported no anal penetration. JT2:105.

Defendant was given an opportunity to present a full defense. Whether S.O. told him to get a sex toy and whether one was used would only have added to his testimony claiming both he and S.O. initiated

and participated in sexual intercourse. *State v. Carter*, 2009 S.D. 65, ¶¶ 36-37, 771 N.W.2d 329, 340. The jury heard testimony from both S.O. and Defendant and made their credibility determination.

B. Defendant has not shown that the court's limit on cross-examination resulted in a constitutional violation.

"The Sixth Amendment to the United States Constitution provides that a criminal defendant has the right to be 'confronted with the witnesses against him.' " *State v. Dickerson*, 2022 S.D. 23, ¶ 27, 973 N.W.2d 249, 258 (quoting U.S. Const. amend. VI). "This right is 'generally satisfied when the defense is given a full and fair opportunity to probe and expose [a witness'] infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.' " *Id.* (quoting *United States v. Owens*, 484 U.S. 554, 558 (1988)). As this Court has explained, "[a]n individual is only guaranteed 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " *Kryger*, 2018 S.D. 13, ¶ 13, 907 N.W.2d at 807 (other citations omitted).

Because the circuit court only limited a portion of Defendant's cross-examination, this court reviews the court's ruling for an abuse of discretion and will only reverse if there is a showing of prejudice. *Dickerson*, 2022 S.D. 23, ¶ 29, n. 3, 973 N.W.2d at 258-59 (citing *Kryger*, 2018 S.D. 13, ¶ 13, 907 N.W.2d at 807). Prejudice occurs only

when "a reasonable jury probably would have a significantly different impression if otherwise appropriate cross-examination had been permitted." *Kryger*, 2018 S.D. 13, ¶ 13, 907 N.W.2d 800, 807 (other citations omitted).

While cross-examining S.O., defense counsel asked her why she went to the bedroom to get away from Defendant. S.O. explained that she did not think she would be able to unlock the deadbolt on the front door. The follow exchange followed:

Q. Did you reach for any type of weapon or anything?
A. No.
Q. Do anything to Keaton to try to get away from him?
A. I remember that I tried to fight him and I slapped him. How hard I hit him, I couldn't even tell you.
Q. Do you know if you told the officer that you did bite him and leave a mark?
A. I did. I told him I bit him on the forearm.
Q. You thought there would be a mark?
A. I figured there would be a mark.
Q. Was there anything else you tried to do to get him – away from him?
A. I slapped him. I kicked him.
Q. Did you grab for anything?
A. No.
Q. Did you tell the police you grabbed for something in the bedroom?
A. Nope. I didn't grab for anything.
Q. Um, did you have any marks on you, cuts on you, bruises?
A. No.

JT 1:36.

While defense counsel was cross-examining Officer Krebs, the following exchange occurred:

Q. Did Keaton explain why they were in the bedroom in his interview?

A. Did he explain why they were in the bedroom?
Q. Yes.
A. He said they went to the bedroom to get something was the only reason they went there.
Q. That there was something that they use consensually during sex?

JT1:80.

Outside the presence of the jury, defense counsel explained she was going down a line of questioning about whether S.O. previously told Officer Krebs that she grabbed for something during the rape. JT1:85. Counsel asserted that, during cross-examination, S.O. claimed that she did not throw anything at Defendant, which was inconsistent with what she told Officer Krebs. JT1:85. The State argued that defense counsel was questioning S.O. about fighting back and grabbing things, which the State understood to mean weapons. JT1:85. The circuit court agreed that S.O.'s prior statement to Officer Krebs was not inconsistent with her testimony and ruled that Defendant could not go down that line of questioning. JT1:92-94.

To impeach a witness through a prior inconsistent statement, the prior statement must be inconsistent with the witness's testimony at trial and the statement must not be related to a collateral issue. *Little Long*, 2021 S.D. 38, ¶ 34, 962 N.W.2d at 250. And the circuit court has considerable discretion when determining if a witness's testimony is inconsistent with his or her prior statements. *State v. Birdshead*, 2015 S.D. 77, ¶ 36 871 N.W.2d 62, 76.

In this case, the circuit court correctly determined that S.O.'s testimony at trial was not inconsistent with what she reported to Officer Krebs. In determining whether the statement was inconsistent, the court can look at the context of the witness's statements. *See State v. Bruce*, 2011 S.D. 14, ¶ 18, 796 N.W.2d 397, 404. Viewing S.O.'s testimony at trial in context shows that it was consistent with what she told Officer Krebs as it related to trying to get away from Defendant. *Compare* JT1:35-36 *with* SR:267-69. Then, when Officer Krebs asked S.O. about the use of sex toys, S.O. reported that she and Defendant previously used sex toys during consensual intercourse but Defendant did not use a sex toy to assault her. SR:269. S.O. explained that, when Defendant grabbed a sex toy from her drawer during the rape, she grabbed it from him and threw it at his face. S.O.'s prior statement to Officer Krebs was about the specifics of the assault and what she did to show Defendant she did not want to have sex with him. S.O. did not claim that she used a sex toy as a weapon to get away from Defendant. The circuit court correctly determined that S.O.'s testimony was not inconsistent with her statements to Officer Krebs.

Additionally, as detailed in Section I(A)(2), *supra*, Defendant was able to cross-examine S.O. about other inconsistent statements and highlight the portions of her story that Defendant later attacked through the cross-examination of other witnesses. Defendant cannot show that the jury would have had a significantly different impression

of S.O. had he been able to cross examine Officer Krebs about S.O.'s purported prior inconsistent statement.

C. Defendant cannot show that the trial court erred in allowing the State to cross-examine him with unadmitted text messages.

Prior to trial, the circuit court determined the parties could introduce evidence that Defendant and S.O. had relationship issues and were prone to arguing followed by make-up sex. MH2:26-27. However, the circuit court excluded most references to the reasons for the arguments and relationship issues—rulings that prevented prejudice to both S.O. and Defendant. MH2:26-27; PTM:4-9, 94-95 (precluding evidence of S.O.'s alleged infidelity, S.O.'s mental health, and Defendant's prior assault of S.O. and the resulting protection order). Before testifying, Defendant asked the court to admit certain text messages to show he and S.O. were working on their relationship and S.O. was fabricating the allegations to keep him from fighting for custody of their daughter. JT2:3-12. Defendant acknowledged that admitting some of the text messages could open the door to other text messages or information. JT2:7-8, 11. The court ruled that Defendant could admit the message and affirmed Defendant's understanding that it may open the door to other messages from the State. JT2:11-12.

During his direct examination, Defendant made the following statement:

> Q. And while you were living together, did you guys talk about one of you moving out often?

A. Pretty much constantly, especially the last two or three months of it. It all stemmed from with my line of work. I'm a heavy equipment operator and I primarily have been traveling for most of my experience with that because I mainly do interstate and highway work. So with the traveling aspect of it, she was very unhappy and that tended to cause those type of arguments.

JT2:27.

On cross-examination, the State sought to admit the rest of the packet of text messages, with redactions based on the court's prior orders. JT2:57-60. As the State explained, Defendant's statement was misleading and opened the door to cross-examination regarding the other reasons for the couple's relationship issues. JT2:59. The State also pointed out that many of the text messages would be used in response to the text messages and impressions Defendant provided on direct examination. JT2:58-62.

The court determined that the entire packet was not admissible because it contained several issues that could turn into sub trials—i.e. custody of the minor child, pictures of bruises, and talk of protection orders—and would be too prejudicial. JT2:60-61. However, the court decided that what occurred before the rape, during the rape, and after the rape was relevant and allowed the State to cross-examine Defendant regarding the couple's relationship issues. JT2:61.

"Courts have discretion to allow an ordinarily inadmissible inquiry when an adversary 'opens the door' to that line of inquiry." *State v. Buchholtz*, 2013 S.D. 96, ¶ 12, 841 N.W.2d 449, 454 (citing *State v.*

Letcher, 1996 S.D. 88, ¶¶ 25–26, 552 N.W.2d 402, 406–07) (other citations omitted). In this case, the circuit court barred testimony about the subject of the arguments between Defendant and S.O. for both of their benefit. When Defendant testified that S.O. was unhappy because he travelled for work, he invited the jury to make the logical inference that S.O. was being unreasonable while he was just trying to support his family. *See Letcher*, 1996 S.D. 88, ¶¶ 25–26, 552 N.W.2d at 406–07 (noting that expert testimony questioning the victim's credibility invited the jury to infer that the defendant's sexual functioning was normal and thus "opened the door" to testimony regarding the defendant's purported sexual dysfunction). Once Defendant opened the door, the State was allowed to respond and contradict his assertion using evidence that the court previously excluded. *Id.* at ¶¶ 20, 25, 552 N.W.2d at 405-06 (allowing the State to cross-examine the defense expert with information previously precluded by the State's failure to disclose before trial); *State v. Byrum*, 399 N.W.2d 334, 337 (S.D. 1987) (explaining that the State could use a prior drug deal to impeach the defendant's testimony after he represented to the jury that he would not take part in the sale of drugs). The circuit court did not abuse its discretion.

Using the unadmitted text messages, the State asked Defendant about S.O.'s messages to Defendant stating she told him "no" and cried

while he raped her. JT2:73-75. [7] The messages also included conversations where Defendant and S.O. were arguing about the frequency in which they were intimate. JT2:83-86. S.O. told Defendant to find someone else to have sex with and that he could give that person her room and have half of the rent. JT2:83. Defendant then claimed S.O. did not do her half of things to make a relationship work and suggested he felt like they were just roommates. JT2:83. S.O. replied that roommates do not have sex and Defendant countered "But they do. Especially the ones that don't pay rent." JT2:83. The conversation continued with S.O. saying she contributed and Defendant claiming that those contributions did not amount to half of the expenses. JT2:84. S.O. then said she was done and was going to start packing. Defendant explained this is how their conversations often went. JT2:84.

The State also asked Defendant about S.O.'s text messages saying she did not want to have sex with him on the day of the rape. JT2:94-95. Defendant explained he did not have much information about the allegation until S.O. explained over text messages. JT2:95-96. Defendant questioned S.O.'s intent in texting him about the allegations and said "she didn't get what she was after." JT2:95-96.

On appeal, Defendant claims the circuit court's prior Rule 412 rulings, including those that excluded S.O.'s alleged infidelity, prevented

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[7] The text messages are not in the record, so the conversation is based on the cross-examination of Defendant.

him from contextualizing the text messages the State used on cross-examination. DB at 28-29. However, Defendant opened the door to the State's use of otherwise inadmissible evidence; he should not get to reap the benefit of his own noncompliance with the court's order. And, on appeal, Defendant failed to cite any authority allowing him to do so. Indeed, any rule allowing such would incentivize disobeying court orders—i.e. intentionally opening the door—as a way to admit otherwise inadmissible evidence.

Defendant also argues the court prevented him from admitting the text messages because it incorrectly suggested that Defendant could be charged based on the "sex for rent" comments. DB at 28-30. However, the record shows that defense counsel agreed that the entire packet of text messages should not be admitted. JT2:63-64. As his counsel explained, the text messages included pictures and text messages detailing Defendant's prior physical assault against S.O.—which the circuit court precluded the State from mentioning.

Furthermore, defense counsel asked Defendant questions on re-direct that allowed him to provide the jury with any missing context. Defendant was able to explain his desire for more sex with S.O. was part of working on their relationship. JT2:88. Defendant stated the relationship was hot and cold and the couple would sometimes break up multiple times a week. JT2:89-90. Defendant explained he and S.O. would usually make up within a few hours of a fight. JT2:90.

Defense counsel also used other unadmitted text messages exchanged after the rape. This allowed Defendant to contextualize the messages referenced during the State's cross-examination while also shielding Defendant from any prejudice that could have resulted if the entire packet of text messages was admitted. Counsel asked him questions about a conversation where he and S.O. were making plans to go to the zoo and making plans for Father's Day. JT2:91-92. Counsel also elicited testimony from Defendant describing text messages he sent S.O. after the rape telling S.O. to be honest with herself, saying he could not believe she was doing this to him, and asking her if her friend helped her make up the story. JT2:94. Defendant then, again, said he believed S.O. was accusing him of rape so he would not be able to fight for custody of their child. JT2:94. Indeed, even if Defendant could show error, he cannot show that prejudice resulted.

More problematic is the absence of the text messages at issue in the record. It is Defendant's burden to present this Court with an adequate record on appeal. *Owens v. Moyes*, 530 N.W.2d 663, 665 (S.D. 1995) (Appellant bears the burden of providing the Supreme Court with an adequate record). In the absence of an adequate record, this Court presumes the circuit court acted appropriately. *Id.*

CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests Defendant's conviction be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12-point type. Appellee's Brief contains 9,154 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2016.

Dated this 3rd day of July 2023.

/s/ Chelsea Wenzel
Chelsea Wenzel
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 3, 2023, a true and correct copy of Appellee's Brief in the above-captioned matter was served electronically by Odyssey File and Serve upon Defendant and Appellant, Keaton Van Der Weide, through his attorney Kristi Jones, at kristi@dakotalawfirm.com.

/s/ Chelsea Wenzel
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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 30028

STATE OF SOUTH DAKOTA,
Plaintiff and Appellee,
v.
KEATON VAN DER WEIDE
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA

THE HONORABLE RACHEL RASMUSSEN
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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ARGUMENT

First, the State argues that "Defendant claims the rape shield statue only prohibits *prior* sexual conduct" but instead the new version of the law does not allow evidence a victim engaged in *other* sexual behavior." State's Brief pg. 18-9. Van Der Weide explicitly cited Rule 412 containing the language of "*other* sexual behavior," and cited to standing case law using the phrase "*unrelated* sexual behavior," and "*prior* sexual behavior." These are the phrases used in case law, and the State draws a distinction with no difference. The prohibition under statute and case law is other, unrelated, or prior sexual behavior– not the actual, related, accused sexual behavior for which the rape is being alleged, as is the case here.

The State cites two federal cases for the proposition that "unlike previous rape shield statues, there is nothing in Rule 412 that narrows the exclusion of evidence to that of "prior" sexual behavior." State's Brief pg. 19. These cases are not about a distinction between "prior" and "other" but instead bolster Van Der Weide's argument that this evidence should have been allowed to prove S.O. consented.

The first case cited was *United States v. Elbert*, and regarded a child sex trafficking charge. 561 F.3d 771, 776 (8th Cir. 2009). In this case, Elbert sought to introduce evidence that his victims engaged in "other acts of prostitution" unrelated to his acts. The court did not allow this evidence because it did not fit into the only three purposes for which this evidence can be received, those being: "(1) to prove a person other than the accused was

the source of the semen, injury or other physical evidence; (2) to show the victim consented to sexual activity with the accused; and (3) to avoid a violation of the defendant's constitutional rights." *Id.* The *Elbert* Court noted none of these purposes were present because Elbert was not charged with assault or sexual contact, and even if he was, they were minors and could not consent. *Id.*

In *United States v. Lockhart*, another sex trafficking case, the defendant sought to introduce evidence of the victims "prior and post-indictment acts of prostitution." 884 F.3d 501, 509 (5th Cir. 2016). Here again, this was a sex trafficking case, not one in which an assault was alleged. Additionally, as with the prior case, defendants sought to introduce sexual behavior of the victims that was not related to their actions.

This is not the same evidence sought for introduction by Van Der Weide. The above cases excluded evidence of victim's sexual actions, whether they were prior, other or unrelated to the defendants. Here, Van Der Weide sought to introduce sexual acts with S.O. relating to the actual encounter in which the rape is claimed against him. In order to defendant against the rape, Van Der Weide necessarily had to say what happened during that *exact encounter* to prove that S.O. consented. His testimony was that he knew S.O. was consenting because she told him to go get a sex toy to use, as was their normal consensual way of engaging. Prohibiting him from saying this at all denied him a fair opportunity to put on his full defense.

Next the State attempts to parse evidence that is "relevant and material to a fact issue in the case." State's Brief pg. 22. Essentially, the State argues that if the State did not need evidence of the sex toys to prove the rape, "the use of sex toys was not a material element or material issue that the jury needed to decide." Id. This argument, if followed to its logical end, would preclude many defendants from putting on their defense. Here, the rape shield law explicitly allows a defendant in a criminal case to offer evidence "...specific instances of a victim's sexual behavior *with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent....*" S.D.C.L. 19-19-412 (emphasis added). The circuit court applied this law so broadly it proactively blocked Van Der Weide from admitting sexual conduct, related to him, to prove S.O. consented.

The State did, rightly, point out that the circuit court was concerned with "persuading the jury by illegitimate means" given Van Der Weide's statements and actions prior to the trial. A circuit court should always be concerned with this. This is why the rape shield law exists – to balance the interest of a victim not being harassed or embarrassed with the rights of a defendant to defend himself. Despite ill-advised statements and proffers by Van Der Weide, it is the circuit court's job to sift through the arguments, good and bad, and admit evidence that is permitted by statue and case law.

The evidence regarding the sex toys being used during the encounter was relevant, as noted by the court, to the defense of consent. The probative

value of that evidence cannot be understated. It is evidence of the very defense being claimed. Van Der Weide could say it was consensual, but he was not allowed to say how or specifically why he knew it was consensual. He was prohibited from mention of key facts that happened between them during the encounter. No case law cited by the State prohibited a defendant from entering of evidence of the actual sexual encounter between the two parties alleged in the rape.

Next, the State argues that if this was error, it was not prejudicial. Van Der Weide was not allowed to put on his full defense, making this highly prejudicial. Because of the error in early rulings, Van Der Weide was not allowed to cross-examine S.O. on these issues, and he was not allowed to testify about what happened that day, police could not be questioned on the sex toys found in the apartment that verified Van Der Weide's statements, and Van Der Weide was unable to argue his statement lined up with that of S.O.'s friend who called during the encounter when S.O. told him to go get the toys. Further, Van Der Weide's confusion and frustration was evident throughout the transcript because he did not know how to say what happened when the circuit court continued to bar him from mentioning a key event that proved consent. The jury witnessed this frustration, and the admonishment by the circuit court, which very likely made an impression.

The difference between saying "I know she consented" and "I know she consented because she asked me to go get a sex toy to use, as we typically do,

and then she allowed me to use it" coupled with evidence that there were sex toys in the apartment, which was also consistent with the timeline of a third party, and about which S.O. made inconsistent statements, is *drastic*. Prohibiting this evidence from being presented to the jury in all probability did produce some effect on the final result of this case and affected Van Der Weide's right to put on his defense.

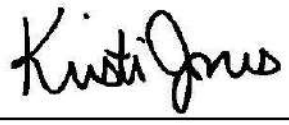
As to all other issues raised by the State, Van Der Weide relies upon the arguments already presented to this Court in his opening brief.

CONCLUSION

The circuit court erred in its application of the Rape Shield Law and subsequent rulings regarding Van Der Weide's ability to cross examine S.O. and evidentiary rulings in admitting partial, incomplete messages. Accordingly, Van Der Weide requests this Court reverse and remand for a new trial.

Dated this 2nd day of August, 2023.

Respectfully submitted,
DAKOTA LAW FIRM, PROF. L.L.C.
KRISTI L. JONES



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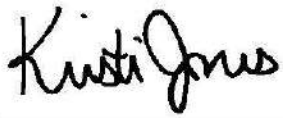

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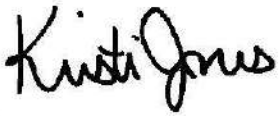
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of August, 2023 a true and correct copy of the foregoing brief was served on the Attorney General's Office via file and serve to atgservice@state.sd.us.



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